



REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

2874 F

OF

THE STATE OF MISSOURI.

BY CHAS. C. WHITTELEY,
REPORTER.

VOL. XXXII.

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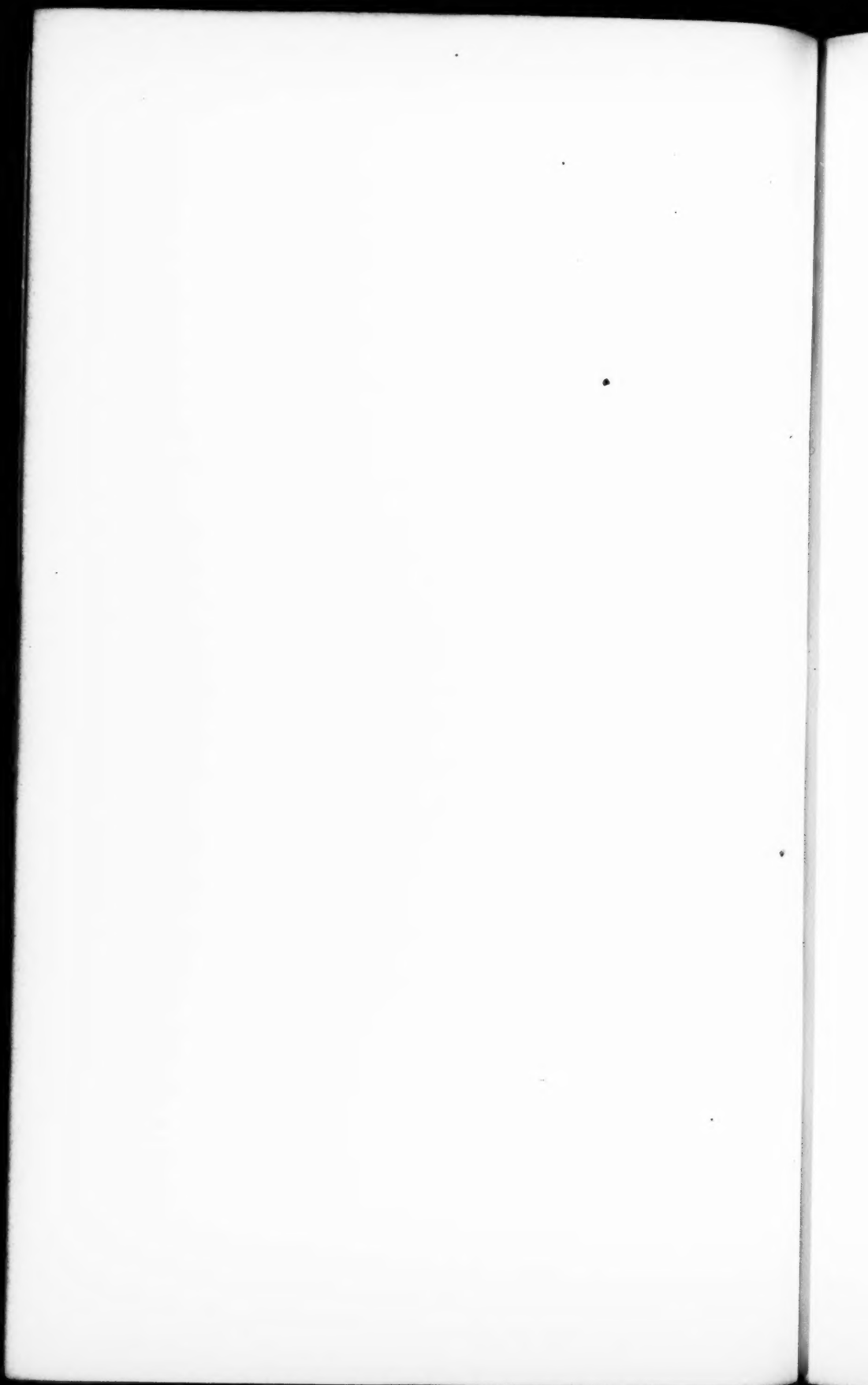
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HON. BARTON BATES, *Chief Justice.*

HON. WILLIAM V. N. BAY, }
HON. JOHN D. S. DRYDEN, } *Associate Justices.*

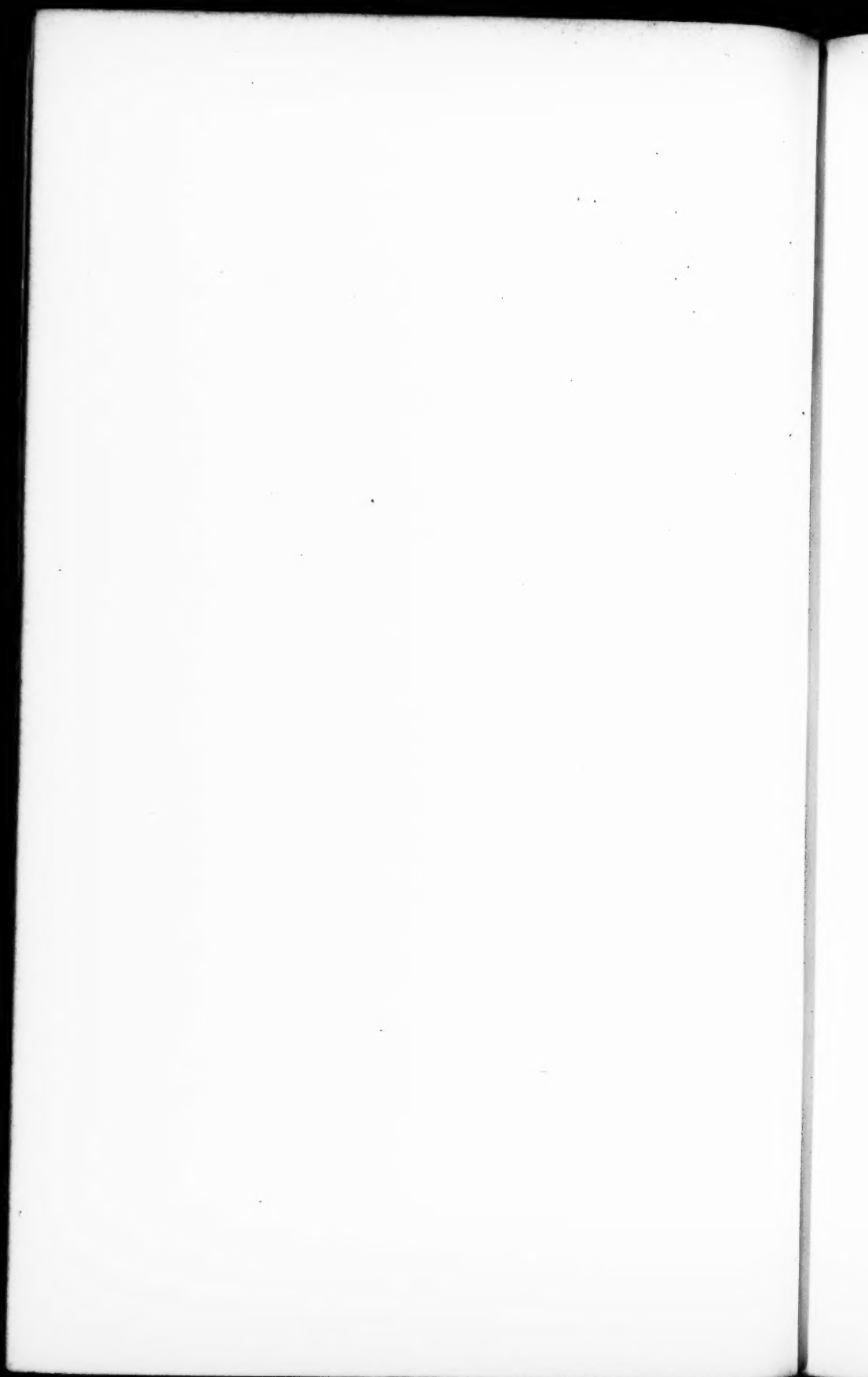
ANDREW W. MEAD, *Clerk.*

CHARLES C. WHITTELEY, *Reporter.*



P R E F A C E .

The statute providing for the reporting the Decisions of the Supreme Court requires that "the opinion of the Court shall, in all cases, be reduced to writing and filed in the cause to which it relates, which shall apply as well to motions which will dispose of the cause as to final decisions." The reporter has understood this, not only as requiring, that opinions shall be filed in all cases, but also in connection with the first section providing for reporting the opinions, that all cases shall be reported; and, consequently, he has not considered himself at liberty to omit any cases, although merely repeating rules of practice, as affirming judgments or dismissing appeals because transcripts or assignments of errors are not filed. It did not appear that he had any discretion in the matter. The statute also requires counsel, "after a statement of the case, briefly to state the points, which brief, containing the points and authorities, shall be filed with the opinion of the court, and be published with the Decisions." For this reason, the reporter has published the points of counsel, (in many cases anything but brief,) generally in their own language. In very many, in fact in most cases, what counsel file as briefs are arguments at length, and not in compliance with the statute or rules of court; but as the briefs of counsel often show the propositions of law upon which the exceptions were taken, it seemed the better plan to abridge and publish rather than to omit them entirely.



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CASES

ARGUED AND DETERMINED

Green & Nilsen
IN 1861

THE SUPREME COURT

OF

THE STATE OF MISSOURI,

MARCH TERM, 1862, AT ST. LOUIS.

JOHN S. McCUNE *et al.*, Appellants, v. BENJAMIN O'FALLON *et al.*, Respondents.

Survey.—The confirmation of a common field lot by virtue of the act of Congress of April 29, 1816, is a complete grant from the date of the act, and a survey is not required to fix the location and vest the title to the specific tract confirmed.

Limitations.—The statute of limitations in favor of an adverse possession of a field lot confirmed by the second section of the act of Congress of April 29, 1816, commences to run from the time of possession taken and before a survey of the claim by the United States. (*Aubuchon v. Ames*, 27 Mo. 98; *St. Louis University v. McCune*, 28 Mo. 481. Affirmed.) Query, before survey, how can the proper location of lines be determined?

Appeal from St. Louis Land Court.

This was an action of ejectment to recover possession of a narrow strip of land on the northern side of a common field lot in the Grand Prairie, confirmed to Francis Leschappelles, Leg. Rep., by act of April 29, 1816, and surveyed as survey

No. 1592, in 1838. The defendant claimed title under an adverse possession for more than twenty years, under the confirmation of an adjoining common field lot to Jacques Labbé's L. R., which was also surveyed in 1838, as survey No. 1587. The titles of the parties to their respective field lots were admitted.

Both confirmations, *in terms*, required survey. The report of Recorder Bates annexes to each the order "*to be surveyed.*" The instructions given are set out in the opinion. The plaintiff asked and the court refused the following instructions:

2. The defendants claiming title under the confirmation to Jacques Labbé and survey No. 1587, any possession by said defendants over the line of their confirmation will not be adverse to the plaintiff claiming under François Leschappelles' L. R. survey No. 1592 until a survey was made by the United States marking out the dividing line between the confirmations of the plaintiff and defendant respectively.

3. The United States survey No. 1592, read in evidence by the plaintiffs, was made by the United States in the year 1838, and said survey first definitively located the lines of the lands between the adjoining proprietors claiming the Leschappelles and the Labbé tracts respectively; and possession by the defendants and those under whom they claim under the confirmation to J. Labbé's L. R. over the lines of the tract surveyed for F. Leschappelles' L. R. by survey No. 1592, although continued for more than twenty years prior to the commencement of the suit, was not adverse to the plaintiffs and those under whom they claim until said survey was made by the United States in 1838, and the defendants have shown no defence to the plaintiffs' action, under the statute of limitations, by virtue of such possession over the lines of the Labbé and within the line of the Leschappelles survey.

4. If the jury believe from the evidence that the defendants claimed title to part of survey No. 1587 under the confirmation of J. Labbé, and their possession had extended over the line before the survey was made by the United States for

the plaintiffs by survey No. 1592, then said possession was not adverse to the title of plaintiffs claiming under F. Leschappelles, as it was a mistake as to the true dividing line between the parties claiming under Labbé and Leschappelles respectively.

Whittelsey, for appellants.

There is no dispute as to the titles, nor as to the fact of actual possession. The inquiry therefore is into the defendants' adverse intention.

I. The confirmation carrying with it a condition that it should "*be surveyed*" until that survey was made, no title passed to any definite tract of land against which prescription could run.

The Supreme Court of the United States, in *Jourdan v. Barrett*, 4 How. 169, 185, say: "Having the power of disposal and protection, Congress alone can deal with the title, and no *State law*, whether of *limitations* or otherwise, can defeat the title." This principle was again asserted in a different form in *Bryan v. Forsyth*, 19 How., 334, 336, 338, which was a case of a confirmation of a town lot, by act of Congress upon the report of the register of the land office. Act passed March 3, 1823. The survey was made by the United States in 1840. The court say "the act of 1823 conferred on the grantee an incipient title, and reserved to the executive department the authority to settle the boundaries by actual survey," p. 336. "After that (that is, the survey in 1840), those claiming under Bogardus held the position of one who claims protection by the act of limitations under a younger patent against an elder one," p. 338. (*Cabanné v. Lindell*, 12 Mo. 184, as to the necessity of survey; *Stanford v. Taylor*, 18 How. 409, 412; *West v. Cochrane*, 17 How. 403; *Fenn v. Holmes*, 21 How. 481; *Ledoux v. Black*, 18 How. 473; *Cousin v. Black*, 19 How. 202, 210; *Ballance v. Papin*, 342.)

II. The court erred in giving the instruction for defendant No. 3, and in refusing that of plaintiff No. 4, as to the

question of mistake or want of design of defendants in taking possession, and as to the burden of proof.

a. As a matter of fact, defendants claimed only under Labbé, and supposed themselves to be within the lines of the tract confirmed to him. Until the survey was made by the United States, how could the location of the true line have been determined?

b. As a matter of fact, the defendants do not claim title to the strip sued for under the United States—the source of all title; they do not claim under survey 1592, which describes the land, but under Labbé; their possession, therefore, was not adverse. (*Jackson v. Porter*, 1 Paine, R. 466.)

Possession *per se* is evidence of no more than the mere fact of the present occupation by right. It is not possession alone, but that it is accompanied with the *claim of the fee*, which, by construction of law, is evidence of such estate." (*Brown v. Gray*, 3 Greenl. R. 226.) Possession by mistake will not work disseisin. (5 Greenl. R. 240.)

c. The court should have said, as a matter of law, that the survey showed the true lines, and that until it was made there could be no mistake shown, nor intention to trespass proved. (*Menkens v. Blumenthal*, 27 Mo. 198, 204.) "This line was, as subsequent events (the survey) have shown, a mistake. The survey of the lots has changed this division line, but has given to each a full lot." (*Angell on Lim.* 464.) The inquiry is as to the intent to usurp possession. "In legal language, the intention guides the entry and fixes its character." (*Bradstreet v. Huntington*, 5 Pet. 440; *Ewing v. Burnett*, 11 Pet. 41.)

Krum, for respondents.

I. The leading question in this case is, whether there can be an adverse possession under a confirmation made under the act of Congress, approved April 29, 1816, until there has been an approved survey of such confirmation. This has been determined in the affirmative by this court in *Aubuchon v. Ames*, 27 Mo. 89, and *St. Louis University v. McCune*, 28 Mo. 481.

This case was tried in the court below in view of these decisions, and the facts bring the case clearly within the rule laid down by this court in the cases referred to. The court below, at the instance of the defendants, declared the law to be that twenty years' uninterrupted possession under a claim of title was adverse, unless such possession was without design or by mistake, and the burden was on the plaintiff to show such mistake, &c. The whole question relating to the possession, its duration, and whether it was by mistake or not, was fairly left to the triers of the fact.

I shall not argue anew the question determined in the cases cited above, as I assume the court will adhere to its ruling.

II. There was a practical designation or location of the true dividing line by the parties claiming respectively under Leschappelles and Labbé.

This is shown very clearly by the evidence presented in the record—the ditch—the fence—the claimants on either side working the land up to the ditch for a long series of years without question or dispute. There could have been no mistake about the possession of the defendants and the parties under whom they claim.

That parties by their own acts may designate and particularly locate lines, see the rules laid down in the cases of Biddle v. Mellon, 13 Mo. 335; Joyal v. Rippey, 19 Mo. 660; Taylor v. Zepp, 14 Mo. 482; Rockwell v. Adams, 6 Wend. 467.

BAY, Judge, delivered the opinion of the court.

The main question presented by the record in this case is, whether there can be an adverse possession of a confirmation under the act of Congress of April 29, 1816, until after a government survey thereof. The property in controversy is a narrow strip of land about fifteen feet in width, more or less, by fifteen arpens deep, and is in the northern part of a tract of one and a half by forty arpens in the Grand Prairie common fields of St. Louis, confirmed to the legal represen-

tatives of François Leschappelles under the act of Congress of 1816. Plaintiffs claim title under this confirmation. The United States survey was made in 1838, and approved March 2, 1857. This suit was instituted on the 29th December, 1856.

Defendants claim title under a confirmation to the legal representatives of Labbé under the act of 1816, and the question in controversy relates to the boundary line between the two confirmations. The defendants in their answer allege that they and the parties under whom they claim have been in the continued and uninterrupted adverse possession of the premises in dispute under a claim of title for more than twenty years next before the institution of this suit. Upon the trial below, defendants gave evidence tending to prove that they and the parties under whom they claim had been in open, notorious and uninterrupted possession of the land in dispute, claiming title thereto under Labbé for more than twenty years prior to the institution of the suit; that the land in dispute was enclosed by Henry M. Shreve (under whom defendants claim) as early as 1834; that there was an old ditch along the south side of the land, and along that ditch Shreve or Collet (from whom Shreve derived his title) put up a permanent fence, which extended to the west end of the field lots, and which was made more than twenty years before the commencement of this suit, and has ever since been kept up; that locust, cotton-wood and other trees had grown up along said fence from twelve to eighteen inches in diameter. They also gave evidence further tending to prove that Messrs. Moore (under whom plaintiffs claim) possessed and cultivated the land along on the south side and up to the said fence of Shreve as early as the year 1834, and continued so to possess and cultivate many years afterward. They also gave evidence tending to prove that the fence and possession of Shreve were conspicuous and readily seen, and that the land he claimed could be readily identified. Upon this state of facts, the court gave to the jury the following instructions:

"If the premises sued for are within the lines of the tract of one and one-half arpens in front by forty arpens in depth, confirmed to François Leschappelles, or his legal representatives, as surveyed by the United States, as shown by survey No. 1592, read in evidence by the plaintiffs, then the plaintiffs have shown a legal title to said premises and are entitled to recover, if the jury believe the defendants to have been in possession of said premises at the commencement of this suit, 29th December, 1856, unless the jury believe as in the instruction given for the defendants, numbered 3," which instruction, No. 3, is as follows :

"If the jury find from the evidence that the defendants, and those under whom they claim, have held uninterrupted possession of the land in question for twenty years prior to the institution of this suit, claiming title thereto, such possession is adverse, and the jury should find for the defendants, unless the plaintiffs have proved to the satisfaction of the jury that such possession was taken by mistake, or without design on the part of the defendants, or those under whom they claim, to hold said land against plaintiffs; if the true line between Labbé and Leschappelles' tracts should, when ascertained, include the land so taken possession of within the Leschappelles tract, and the burden of proving such mistake or want of design rests upon the plaintiffs."

The plaintiffs then asked for several instructions substantially declaring that the possession of defendants, and those under whom they claim, although continued for more than twenty years prior to the commencement of the suit, was not adverse to the plaintiffs and those under whom they claim, until after the United States survey (1592) made in 1838, which the court refused to give. In support of the proposition contended for by the appellants, we have been referred to several cases decided by the Supreme Court of the United States, and particularly to the case of *West v. Cochran*, reported in 17th Howard, 403, but we are unable to see the analogy between that case and this. In *West v. Cochran*, plaintiff claimed under Brazeau, who had a confirmation by

the United States commissioners pursuant to the act of March 1807. It was an unsurveyed concession surrounded in part by public lands, and in other parts by the vague and unlocated claims of others, so that a government survey was indispensably necessary to fix and locate the grant. The act of 1807, moreover, required that those vague and indefinite concessions should be surveyed under the direction of the surveyor general, whose duty it was to transmit plats thereof to the recorder, and also to the secretary of the treasury, and thereupon the claimant received a patent certificate. The act furthermore provided that the claimant should be confirmed in what should be designated by a survey made under the authority of the United States, according to the direction of the board of commissioners, and the court held that until such survey was made the plaintiff's title attached to no land, nor could a court of justice ascertain its boundaries, as this power was reserved to the executive department of the federal government.

The case under consideration is very different, for both the confirmations under Leschappelles and Labbé are under the act of 1816, an act totally different in its terms from the act of 1807. We have here, moreover, a fixed, certain and definite boundary line adopted and acquiesced in by both parties and those under whom they claim, since 1834, recognized by all parties, and possessed and cultivated by the respective claimants up to the fence, without any dispute or controversy respecting the correctness of the line. But the same court immediately after, in *Stanford v. Taylor*, 18th Howard, 409, declared that the law was settled, that where there is a specific tract of land confirmed according to ascertained boundaries, the confirmer took a title on which he could sue in ejectment. The same doctrine is laid down in *Bissell v. Penrose*, 8th Howard, 317. But when the claim has no certain limits and the judgment of confirmation carries along with it the condition that the land shall be surveyed, then the title attaches to no land until such survey is made.

Papin v. Ryan & Walker.

The question in this case, we think, has been definitely settled by this court in *Aubuchon v. Ames*, 27th Mo. 98, and *St. Louis University v. McCune*, 28th Mo., 481. In *Aubuchon v. Ames*, the court held that where a field lot, confirmed by the second section of the act of April 29, 1816, has a definite and certain location, the statute of limitation will run in favor of an adverse possession prior to a survey by the United States.

In the case of the *St. Louis University v. McCune*, the controversy was respecting a part of the narrow strip in dispute here.

We see no reason to depart from the doctrine laid down in these cases. Judge Bates and Judge Dryden concurring, the judgment of the court below will be affirmed.



ADOLPH PAPIN *et al.*, Plaintiffs in Error, v. RYAN AND WALKER, Defendants in Error.

Evidence.—The acts of Congress confirming claims to land in Missouri are public not private acts, and will be judicially noticed without being read in evidence.

Schools.—A confirmation under the act of Congress of July 4, 1836, to land within the out-boundary survey of the town of St. Louis, is a title, notwithstanding the reservation to the use of schools under the acts of June 13, 1812, and January 27, 1831, and a mere trespasser cannot defend against it.

Survey.—Until the lands reserved for schools by the act of 1812, and granted by the act of 1831, are designated and set apart by the surveyor general, the grant made by those acts does not attach to any particular land.

Appeal from St. Louis Land Court.

This was an action to recover the possession of a tract of land in the city of St. Louis, and within the out-boundary of the town, as surveyed under the act of June 13, 1812.

The plaintiffs claimed title under a confirmation by the act of Congress of July 4, 1836, to Joseph Brazeau, or his legal representatives, and also by virtue of inhabitation, cultivation and possession prior to Dec. 20, 1803, and the confirming act of June 13, 1812.

Papin v. Ryan & Walker.

The plaintiffs offered in evidence the reports of the board of commissioners under the acts of 1832 and 1833, together with the grants to Brazeau by Cruzat and Delassus, and a survey by Antoine Soulard, dated August 21, 1803; and then offered evidence tending to prove cultivation and possession prior to Dec. 20, 1803.

At the close of the testimony for plaintiffs, the defendants, without offering any evidence, requested the court to instruct the jury, "That under the evidence the jury should find for the defendants"; which was done, and verdict entered for the defendants.

A. Buckner, for plaintiffs in error.

I. The confirmation by virtue of section 1, of the act of June 13, 1812, is a complete grant, (*Guitard v. Stoddard*, 16 How. 494,) and no subsequent legislation could affect it. (*Soulard v. Clark*, 19 Mo. 382; *Carondelet v. McPherson*, 20 Mo. 193; *St. Louis v. Tony*, 21 Mo. 243.) A party may put as many strings to his bow as he likes, and play on any one of them that pleases him best.

II. There was evidence tending to prove possession of the premises sued for prior to the 20th December, 1803, and if there was any testimony to that effect the court erred in taking the case from the jury by its instruction. (*Rippey v. Friede*, 26 Mo. 523; 18 Mo. 170; 12 Mo. 387.)

III. The plaintiffs proved title under the act of Congress of July 4, 1836, and the defendants having offered no evidence whatever, the judgment must be reversed for that cause.

Glover and Shepley, for defendants in error.

I. The acts which give title under the act of June 13, 1812, must operate as a substantial, visible and continuous claim of ownership of the land, such as could be seen and known by all persons. (*Papin v. Hines*, 23 Mo. 276; *Sarpy v. Papin*, 7 Mo. 507; *Soulard v. Clark*, 19 Mo. 570.)

II. There was no evidence of any possession of the land claimed within the meaning of the act.

III. The plaintiff did not give in evidence the act of July 4, 1836. There was nothing but a report of the board of commissioners before the court and jury, and no evidence of any confirmation. The act is a private act, and should have been given in evidence. (1 Kent, C. 459; Dwar. Stat. 464.)

IV. As the land claimed was within the out-boundary of St. Louis, there could be no confirmation by act of July 4, 1836, within that out-boundary. (Cabanné v. Walker, 21 Mo. 274.)

BATES, Judge, delivered the opinion of the court.

This is an action of ejectment for possession of a piece of land in the city of St. Louis.

The same claim was before this court in the case of Papin v. Hines, 23 Mo. 275. That case was taken by writ of error to the Supreme Court of the United States, but was dismissed there for want of jurisdiction, there having been no final judgment in the case.

In that case the defendant showed title in himself by an entry, and a patent from the United States in 1826. In the present case the defendants showed no title. After the plaintiff had given evidence of his title, the court instructed the jury that "under the evidence in this case the jury should find for the defendants." Under that instruction a verdict was given for the defendants and judgment rendered in accordance with it, from which the plaintiffs appealed to this court. The plaintiffs claim to be the representatives of Joseph Brazeau. At the trial of this case evidence was given of a confirmation by the act of July 4, 1836. The evidence given was of the proceedings of the board of commissioners under the act of 1833, whose report was confirmed by the act of 1836.

The defendants contend that the proof of confirmation was not complete because the act itself was not given in evidence.

We do not consider the act of 1836 a mere private act. It concerned the public lands as well as the mere private claims confirmed by it. The courts will take judicial notice of it. The defendants also contended that as the land in dispute was within the out-boundary of the town of St. Louis, surveyed under the act of 13th June, 1812, that the plaintiffs could have no title under a confirmation by the act of 1836, because all the vacant lands within that out-boundary were by the act of 1812 reserved, and by the act of 1831 granted for the use of schools. The defendants, who stand as mere trespassers, cannot make this objection, which, if made by the schools themselves, could not be maintained.

There was no evidence that this land was ever designated and set apart for the use of schools. The act of 1812 is a reservation only, and the act of 1831 is a grant; but the act of 26th of May, 1824, supplementary to the act of 1812, required the surveyor general to survey, designate, and set apart the school lands, and until such designation is made, the grant by the act of 1831 is only general, and does not attach to any particular land.

In the case of *Kissell v. St. Louis Public Schools*, (16 Mo. 553,) this question is fully considered and decided. The objections to the confirmation by the act of 1836 cannot be sustained, and as by means of that confirmation the plaintiffs did make a *prima facie* case, the instruction given was erroneous, and the judgment must be reversed.

The plaintiffs also gave evidence which they claim showed a confirmation by the act of 1812. It is not perceived that any opinion given on the case as made will be of any assistance in the final determination of the cause, as upon a new trial the evidence may vary so greatly from that now given. As to any confirmation by the act of 1814, the case of *Papin v. Hines*, 23 Mo. 275, fully disposes of that subject.

Judgment reversed and cause remanded. Judges Bay and Dryden concur.

DAVID ADAMS, Appellant, v. CITY OF ST. LOUIS, Respondent.

Title.—The State of Missouri, by virtue of its sovereignty, does not acquire title to the islands that have formed in the Mississippi river since the admission of the State into the Union.

Appeal from St. Louis Land Court.

Action of ejectment upon an entry, and preemption by Sally Adams, under the preemption act of 1830, made with the register and receiver of the St. Louis land district, for part of what is known as Duncan's Island.

Defendant introduced evidence to show that in 1820 the land sued for was a sand-bar subject to overflow in ordinary stages of water, and unfit for cultivation, and showed a conveyance from the State to the City of St. Louis, by an act passed in 1851, granting all right, title and interest of the State. Defendant also proved that the entry of Sally Adams had been set aside by the land department at Washington as illegally made.

J. W. Skinner, with *T. F. Risk*, for appellant.

The title of the United States was not divested by the act admitting the State of Missouri into the Union. It was not divested by any compact with the State.

It was not divested by the *sovereign power of the State*. (*Johnson v. McIntosh*, 8 Wheat. 543; *Fletcher v. Peck*, 6 Cranch. 142; *Journal of Congress*, 6, 123, 147; *Howard v. Ingersoll*, 9 How. 56; *Chicago case*, 18 How. 152.)

C. G. Mauro, for respondent.

It was decided in the cases of *Kissell v. St. Louis Public Schools*, 18 How. 19, and *Jones v. Soulard*, 24 How. 63, that the entry upon which the plaintiff's claim is based was void.

BATES, Judge, delivered the opinion of the court.

This is an action in the nature of an action of ejectment. At the trial the plaintiff gave evidence of an entry with the register and receiver of the land office at St. Louis of the land in question by Sally Adams, his ancestor.

The defendant gave evidence that the entry so made was cancelled by the commissioner of the general land office. Evidence was given tending to prove that before 1820 the land was a sand-bar in the Mississippi river unfit for cultivation, and was overflowed by ordinary high water, and had not been surveyed as public land.

The court, at the instance of the defendant, gave the following instruction: "If the jury find that the land now in controversy was, at the date of Missouri becoming a sovereign State, a mere sand-bar in the Mississippi river which began to be formed no earlier than 1814, and at the time when Missouri became such State was wholly unfit for cultivation; was overflowed at all times by ordinary high water; had not been surveyed, or in any way claimed as public land belonging to the United States; then prior to said admission no title was obtained under the preemption papers read in evidence, and the plaintiff cannot recover." Judgment was given for defendant, and the plaintiff appealed to this court. If that instruction be understood to mean that the State of Missouri as sovereign acquired title to said land, because it was formed as land since the State had legal existence, it is no doubt erroneous. (See *Jones v. Soulard*, 24 Howard's Rep. 41.)

It appears, however, from the record that the plaintiff's title depends upon the entry made by Sally Adams. That entry was similar to an entry made by Robert Duncan, and cancelled in the same manner and by the same acts by which Duncan's entry was cancelled. Duncan's entry was examined and considered by the Supreme Court of the United States in the case of *Kissell v. The St. Louis Public Schools*, 18th Howard, 19, and declared to be *void*, and that decision was expressly reaffirmed in the case of *Jones v. Soulard*, in 24th Howard.

Under these circumstances we must consider the entry of Sally Adams to be void, and the plaintiff has therefore shown no title.

Therefore, in the judgment rendered by the court below there is no error materially affecting the merits of the action.

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The plaintiff can suffer no injury by an affirmance of the judgment, for he cannot recover upon the facts shown in this case; and if he have another and different title, the judgment in this case will be no bar to a suit upon that title.

Judgment affirmed. Judge Dryden concurs.

Judge Bay, having been of counsel in this suit, did not sit on the determination thereof.

AUGUSTUS H. EVANS, Appellant, v. THE BOARD OF PRESIDENT AND DIRECTORS OF THE ST. LOUIS PUBLIC SCHOOLS, Respondents.

Patent, younger to support an equity against an elder title.—It having been decided in the case of Kissell v. St. Louis Public Schools, 16 Mo. R. 553, and 18 How. R. 19, that the entry of Robert Duncan as preemptor of fractional section 26, township 45 north, range 7 east of the 5th principal meridian, under which the plaintiff claims the land in suit, was void; he shows no title, either in law or equity, upon which he can impeach the defendant's title under the acts of 1812 and 1831. (See Magwire v. Tyler, 30 Mo. 202, and 25 How.)

Appeal from St. Louis Land Court.

No counsel appeared for appellant.

Casselberry, for respondent.

The land in controversy is within the corporation of 1809 of the town, now city, of St. Louis. The corporation of 1809 was in full force when the act of 1812 was passed, which reserved all vacant lands in St. Louis for the support of schools therein. The land in suit is the same that was in controversy in the case of Kissell v. The Schools, 16 Mo. 553, and 18 How. 19, which decided that the plaintiff's entry was void. (Jones v. Soulard, 24 How. 41.) The plaintiff's entry being void, he has no claim in equity.

BATES, Judge, delivered the opinion of the court.

This is an action in the nature of a bill in equity. The petition sets forth that on the 2d day of May, 1836, Robert

Duncan, as a preemtor, entered with the register and receiver of the land office at St. Louis, fractional section 26, township 45 north, range 7 east of the fifth principal meridian, and that he has become by various conveyances the representative of Duncan in said land, and that the defendant has acquired the legal title from the United States to a portion thereof, and that the defendant's title was acquired by improper and illegal means, and prays that the title of the defendant be by decree vested in him, and the defendant required to convey the legal title to said section to him; that the defendant be perpetually enjoined from setting up or in any way making claim to said section or any part thereof, and that judgment be given the plaintiff for possession of so much of said section as is now in the possession of the defendant, and for damages. The defendant's answer, among other things, alleges that the supposed certificate of preemption and the certificate of entry, dated May 2d, 1836, obtained by said Robert Duncan, which are mentioned in said second amended petition, were, in or about the year 1845, annulled and cancelled by the commissioner of the general land office, and are consequently null and void.

At the trial of the cause evidence was given of Duncan's entry, and also of its cancellation. The only instruction asked was given as follows: "The defendant asks the court to declare the law to be, that upon the pleadings and proof the plaintiff is not entitled to the relief asked." To which the plaintiff excepted, and judgment was given for the defendant.

The subject of this suit was formerly before this court in the case of *Kissell v. The St. Louis Public Schools*, (16 Mo. 553.) That case was taken to the Supreme Court of the United States, which court held that the entry of Duncan was void, (18 How. Rep. 19.)

The Supreme Court of the United States has also since held, in the case of *Jones v. Soulard*, 24 How. 41, and expressly decided "that Duncan's entry set up in defence in the court below is void, as this court held in the case of *Kis-*

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sell v. The St. Louis Public Schools, 18 How." In this case, therefore, the entry of December, under which the plaintiff claims, being absolutely void, he has no title whatever, and no right to impeach the defendant's title in law or equity.

Judgment affirmed, the other judges concurring.

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JAMES G. BARRY, Appellant, v. AUGUSTUS A. BLUMENTHAL,
Respondent.

Confirmation.—Acts 1812 & 1816. A confirmation by virtue of the first section of the act of Congress of June 13, 1812, is a better title than a confirmation under the act of April 29, 1816.

Survey.—The private claims within the village of Carondelet, although included within the survey, must be understood to be excepted from the confirmation of commons to the town, and it was properly left to the jury to find whether the premises sued for had been used by the inhabitants as a part of the common of the village.

Limitations.—*Confirmation by Act of 1816.*—Aubuchon v. Ames, 27 Mo. 89; St. Louis University v. McCune 28 Mo. 481, and McCune v. O'Fallon, 32 Mo. Affirmed.

New Trial.—An application for a new trial, on the ground of newly discovered evidence, must show that due diligence has been used.

Appeal from St. Louis Land Court.

For statement see the opinion of the court.

Casselberry, for appellant.

I. The plaintiff claims title by intermediate conveyances from William Russell, to whom the land in controversy was confirmed by the act of Congress of April 29th, 1816, as a "lot in Carondelet." The defendant claims by intermediate conveyances from the corporation of the town of Carondelet; and by a far-fetched construction of the United States surveys of the common of Carondelet, the defendant pretends that said surveys are evidence against the plaintiff, to show that the land in controversy was confirmed to the town, as common, by the act of Congress of 1812, because said surveys include the town.

To rebut the pretended inference that the land in controversy was common, the plaintiff read in evidence a connected plat of the town of Carondelet, compiled by the surveyor general. This plat shows the location of the town, as it existed during the Spanish government, and it also shows that the premises in controversy are within the town, as it existed prior to December 20th, 1803.

There could not be common of a town without there being at the same time a town, any more than there could be two hills without a hollow or valley between them. The surveys of the common for the town were for the benefit of the proprietors of the town, and not for their destruction. In the case of *Primm v. Haren*, (27 Mo., p. 209,) this court remarked that "a claim for commons within the boundaries of a survey, is not inconsistent with the idea of private claims within its limits. Then the fact is known that a claim to commons is not necessarily hostile to private claims within its limits."

In addition to the connected plat of the town alluded to, the plaintiff read in evidence five confirmations of town lots and the surveys thereof. The lots therein confirmed respectively were town lots in the town of Carondelet during the Spanish government. By reference to the surveys of these confirmations and the connected plat of the town, it will be seen that they surround the premises in controversy, plainly showing that the premises were obviously within the ancient town, and that the land in dispute cannot, with any degree of seriousness, be considered as common. These five confirmations are *prima facie* evidence. See cases of *Vasquez v. Ewing*, 24 Mo. 38; *Biehler v. Coonce*, 9 Mo. 347; *Macklot v. Dubreuil*, 9 Mo. 477; *Boyce v. Papin*, 11 Mo. 16; *McGill v. Somers & McKee*, 15 Mo. 80; and *Carondelet v. St. Louis*, 29 Mo. 527. The connected plat of the town, above alluded to, is also evidence. See the case of *Fine v. Schools*, 30 Mo. 166.

II. The common ought to have been surveyed in two separate tracts. One survey beginning at the upper end of the

town and running northward, and the other survey beginning at the lower end of the town and running southward; and all vacant or unconfirmed pieces of land between the two surveys ought to have been assigned to the Schools, under the second sections of the acts of 1812, 1824, and 1831. If this had been done, the trouble which has occurred in this suit would never have happened.

We admit that those claiming under the act of Congress of the 4th of July, 1836, cannot dispute the common title, because the second section of the act provides that it shall not operate as a confirmation of any land which had been "previously located under any law of the United States, or had been surveyed and sold by the United States." As the common was surveyed, and the survey approved in 1834, the land therein had emphatically been "previously located under a law of the United States," according to the decision of the Supreme Court of the United States, in the case of *Les Bois v. Bramell*, (4 How. p. 463.)

The difference, therefore, between the act of 1836 and all of the prior acts confirming lands, is very broad, plain and obvious. The prior acts (including the act of 1816, which confirmed the land in dispute,) make no such exceptions or reservations as are made in the act of 1836, nor are there any lots in the old French or Spanish town confirmed by the act of 1836. The acts of 1812 and 1816 confirm the lots and lands therein alluded to in a direct and positive manner, without any exceptions or reservations. At the time of the passage of the respective acts of 1812 and 1816, the rights of the confirmees vested, (but were not complete until their survey, where the boundaries were indefinite,) and could not be divested by the surveyor general in making the survey of the common. The powers of the surveyor general, in this respect, were amply explained by the Supreme Court of the United States in their decision last winter, in the case of the Commissioners of the Sixteenth section against John B. Hor-
tez and others, in which the court said that the duties of the surveyor general are of "purely a ministerial function. His

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neglect could not suspend the vesting of the titles granted, much less his blunders forfeit them."

III. The survey of the common is binding and conclusive evidence on the corporation and on the United States, because they are parties to it, and are respectively estopped and bound thereby. (See *Menard v. Massey*, 8 How. 293; *Kissell v. Schools*, 18 How. 19, and *Carondelet v. St. Louis*, not yet published.) And the survey of the common is binding and conclusive on mere squatters, or intruders, or trespassers, and others having no title acquired from the United States, because, having no title acquired from the United States, they are not in a condition to dispute the survey. If the survey is wrong, they are not injured, as they have no rights to be injured, and no one is allowed to complain in a court of justice in any case, except those who are injured. (See *Boyce v. Papin*, 11 Mo. 16; and *Archer v. Bacon*, 12 Mo. 149.) But a person holding title under a valid confirmation in the old town, can dispute the survey of the common, because he has a lawful right, recognized by Congress, of which he cannot be deprived by the surveyor general. (See the case of *Primm v. Haren*, 27 Mo. 209; and the case before-mentioned of the Commissioners of the Sixteenth section v. *Hortez* and others, not yet published.)

The common was surveyed and approved in 1834, and none of the private confirmations were surveyed or approved before 1835. From the year 1835 to 1855 the surveys have been from time to time made, recorded and approved, being a space of more than twenty years, as appears from the surveys read in evidence in this case.

The conclusion, therefore, is correct to which the Supreme Court came to, in the case of *Primm v. Haren*, (27 Mo. 209,) that the survey of the common was never intended to interfere with any rights under confirmations. The court below, therefore, erred in not giving the fifth instruction asked for by the plaintiff, and in giving the first instruction asked for by the defendant.

IV. We contend that the court below erred in not giving

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the fourth instruction asked for by the plaintiff, the effect of which is, that the statute of limitations did not begin to run against the plaintiff until the year 1854, when the survey (125) was made of the land in suit, on account of the boundaries being so uncertain that the title attached to no land until the survey defining the boundaries was made; and, inasmuch as the survey was not made ten years before this suit was brought, the statute of limitations had no application to this case.

That a survey was necessary to define the boundaries there can be no doubt. This can be easily seen by reference to the papers in this case. The notice of claim filed by Wm. Russell, dated November 12, 1812, calls for Second street on the east and the field on the west, but the north and south boundaries are not given.

It has been frequently decided by the Supreme Court of the United States that where the locality or boundaries of a confirmation are indefinite, or cannot be ascertained without a survey, the title attaches to no land until a survey is made. (See *Massey v. Menard's heirs*, 8 How. 293; *West v. Cochran*, 17 How. 403; *Stanford v. Taylor*, 18 How. 411; *Lafayette's heirs v. Kenton and others*, 18 How. 197; *Carondelet v. St. Louis*, not yet published; and *Magwire v. Tyler and others*, not yet published.)

V. The first instruction asked for by the defendant ought not to have been given, because there was no evidence to support it. The land is within the town as it existed prior to 1803. At one time it had a barn on it, and at another a house, and seems always to have been treated as a town lot in the town.

VI. The second instruction asked for by the defendant ought not to have been given, because the land was confirmed to Russell, and not to Bombardier, and the deed from Bombardier to Easton is void for want of certainty as to the description of the lots conveyed. The United States held the title and granted it to Russell, and not to Bombardier, and we are governed exclusively by the grant to Russell. The

effect of the instruction was to go behind a confirmation and treat the title of Bombardier as valid, when he never had any thing more than an *inchoate* right, of no standing in a court of law or equity.

VII. The fifth instruction asked for by the defendant ought not to have been given for many reasons. It allowed the statute of limitations as a defence, which ought not to be allowed, for the reasons hereinbefore given. It allowed the jury to determine whether the confirmation by the United States to Russell had boundaries or not, which is a question of law, to be determined by the court. *What* boundaries are, is a question of law for the court to decide, and *where* the boundaries are, is a question of fact to be decided by the jury. (See the case of *Whittelsey v. Kellogg*, 28 Mo. 404.) It allowed the jury to ascertain the boundaries of the land in suit. The ascertaining and fixing of boundaries are not judicial acts, and cannot be lawfully performed by either court or jury. The fixing or defining boundaries is an executive act, and must be performed by the surveyor general. (See cases of *West v. Cochran*, 17 How. 403; *Kissell v. The Schools*, 18 How. 19; and *Ballance v. Forsythe and others*, 24 How. 185.)

VIII. A new trial ought to have been granted on the affidavits read in support of the motion for a new trial, for reasons which are sufficiently manifest on inspection of the affidavits.

F. A. Dick, for respondent.

I. The instructions given authorized the jury to find for the plaintiff, unless they believed the defence set up was sustained by the evidence, and there was no error in refusing those asked by plaintiff.

II. The first instruction for defendant merely declared that a confirmation to Carondelet of June 13, 1812, was a better title than one of April 29, 1816, to the plaintiff.

III. The second instruction for defendant told the jury that, to enable Russell to have the benefit of the confirmation to

Bombardier, he must have a conveyance from him. (Hogan v. Page, 22 Mo. 55, 66.)

IV. Instruction 5 merely repeated the law, as declared in Aubuchon v. Ames, 27 Mo. 89, that possession was a defence if prior to the survey the premises in question had a definite location and limits.

BATES, Judge, delivered the opinion of the court.

This is an action, in the nature of an action of ejectment, commenced by the plaintiff, on the 29th day of April, 1857, in the St. Louis Land Court, for the possession of a part of survey 125, in block 84, in the former town, now city, of Carondelet.

The defendant, in his answer, denies all of the material averments in the petition, and sets up the statute of limitations; and also claims to be the owner himself of the premises in controversy.

The judgment of the court below was in favor of the defendant, and the plaintiff appealed to this court. At the trial in the court below, the plaintiff read in evidence a confirmation, under the act of Congress of the 29th of April, 1816, to William Russell, under Joseph Bombardier, and the notice of claim and documents accompanying the same from the United States recorder of land titles.

The notice of claim filed by Russell with the recorder is dated November 12, 1812, stating that, under the Spanish government and laws of Congress, he claims 120 French feet in front, be the same more or less, on the western side of the most western main street of Carondelet village, and extends westward from the said street to the common field lots 120 French feet wide, be the same more or less, to the distance from said street to the common field, and that all of which he claimed as assignee of Rufus Easton, who was assignee of Joseph Bombardier. Accompanying the notice, the claimant filed two deeds. One deed is from Joseph Bombardier to Rufus Easton, dated September the 5th, 1807, describing the property as two lots, in the village of Carondelet, with a log

house, stable and hen-coop thereon, situated on the third street of said village, being the same house and lots purchased of John Boli and Madam Bourdoin. And the other deed is from Rufus Easton to William Russell, dated January 7, 1812, describing the property as two certain lots of ground, situated in, and adjoining, the village of Carondelet, fronting on, and adjoining, Third street from the Mississippi river, admitting First street to be the bank of said river, bounded on the eastward by Third street, on the southward by a cross street, on the westward by the limits of the common field, and on the north by land unknown, supposed to contain two acres, being the same purchased of Easton, who purchased from Bombardier. There is no concession, or other documents, or written title, to the property in dispute, from the Spanish government, to any one.

The confirmation is to "William Russell, under Joseph Bombardier," and describes the property as a "lot in Carondelet, 120 feet front, back to fields," and refers to the book and page where the claim and accompanying documents are recorded; and adds these words, "granted to be surveyed according to possession."

The plaintiff read in evidence a notice of claim, filed by Easton with the recorder of land titles, dated June 27th, 1808, stating that he claims, as assignee of Bombardier, who is assignee of John Boli and Madam Bourdoin, two lots of ground, called village lots, in the village of Carondelet, on which there is a house, stable and hen-coop, on Third street, of said village.

The plaintiff then read in evidence survey 125, being a survey of the confirmation to William Russell, under J. Bombardier, before mentioned. This survey was made on the 15th of May, 1854, and finally recorded and approved by the surveyor general on the 16th day of June, 1854.

The plaintiff also read in evidence, the confirmation certificate of the recorder of land titles, in the usual form, dated June 23, 1854, stating that the confirmee is entitled to a patent for the land included in the survey.

The plaintiff then read in evidence a deed from William Russell to Thomas Allen, dated April 15, 1850, describing the property in the same manner as in the deed from Easton to Russell.

The plaintiff then read in evidence a deed from Thomas Allen and wife to James G. Barry, the plaintiff in this suit, dated April 18, 1850, with the same description as in the deed from Russell to Allen. The defendant admitted that he was in the possession of the premises in controversy at the time of the commencement of this suit.

The parties admit that the defendant, within three months after the commencement of this suit, appealed to the commissioner of the general land office from the decision and proceedings of Surveyor General Loughborough, in relation to ordering, making and approving of said survey 125, read in evidence; but the plaintiff at the same time protested against, and denied the right of, the defendant to appeal as aforesaid, and denied that said appeal had any effect on his right, title, or interest, in or to the premises in controversy. The record contains a copy of the report of the surveyor general to the commissioner of the general land office on the appeal.

The plaintiff then read in evidence, the decision of the commissioner of the general land office, dated October 26th, 1859, affirming the decision and proceedings of the surveyor general, but declining to grant a patent, as requested by the plaintiff, in consequence, as he said, of the *locus* of the survey (125) being involved in much doubt and uncertainty, but left the parties with the evidence of title in their respective possessions: that is, the plaintiff under his confirmation and survey, and the defendant under the corporation of Carondelet, to submit their rights for adjudication to the courts, and to that end, delivered the survey and the patent certificate to the plaintiff. The plaintiff, at the time of reading the decision of the commissioner, protested against any statement made therein.

The plaintiff here rested his case.

The defendant then read in evidence the acts of Congress of June 13, 1812, May 26, 1824, and January 27, 1831, and an act of the legislature of this State of February 13, 1833, authorizing the corporation of Carondelet to sell lots within the corporate limits of the town. The plaintiff excepted to the reading of said acts, on the ground of irrelevancy and incompetency.

It was admitted that the town of Carondelet was incorporated in 1832, and that the premises in controversy are within the limits of the corporation of 1832.

The defendant offered to read in evidence Brown's survey of the common of Carondelet, made in 1834; to the reading of which the plaintiff objected; but said objection was overruled and the same was read, and the plaintiff at the time excepted to the decision of the court in overruling said objection.

The defendant offered to read in evidence Rector's survey of said common, made in 1817; to the reading of which the plaintiff objected; but said objection was overruled and the same was read, and the plaintiff at the time excepted.

The defendant then offered to read in evidence Eiler's survey of the town of Carondelet, being the survey mentioned in the act of the legislature of February 13, 1833; to the reading of which the plaintiff objected; but said objection was overruled by the court and the same was read, and the plaintiff at the time excepted.

The defendant then offered to read in evidence an ordinance of the former town of Carondelet, passed June 2d, 1834, authorizing deeds to be made for lots within Eiler's survey; to the reading of which the plaintiff objected; but said objection was overruled and said ordinance was read, and the plaintiff at the time excepted.

The defendant then offered to read a deed from the town of Carondelet to Auguste Gamache, dated September 9, 1843, in consideration of the sum of five dollars, for the south half of block 84, in Eiler's survey, including the premises in controversy; and a deed from said Gamache to Augustus A.

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Blumenthal, the defendant, for the same half block, dated July 28, 1847, in consideration of the sum of one hundred and fifty dollars. The plaintiff objected to the reading of said two deeds, but the court overruled said objection and said deeds were read in evidence, and the plaintiff at the time excepted.

The defendant then read in evidence several depositions of witnesses, tending to prove that the defendant had been in the actual, continual possession of the premises in controversy more than ten years next before the time of the commencement of this suit; that the lots in the former town were 150 feet square, and no larger; that there were only two streets besides Water street in the town prior to Eiler's survey in 1832, that is to say, Main street and Second street; that between Second street and common field the land was generally open and unoccupied, and covered with timber; that the people sometimes cut the timber for their own use, and that cattle and other live stock of the town were allowed to graze there as well as elsewhere; that during the Spanish government there was a barn on the extreme east end of the confirmation, (survey No. 125,) which was afterwards taken away; that after this Pierre Maison built a house at said extreme east end on Second street, at an early day, but since the change of government, and that there were no cross streets west of Second street until Eiler's survey in 1832. The plaintiff objected to the reading of each and every one of said depositions on the ground of incompetency and irrelevancy; but the court overruled said objection, and the plaintiff at the time excepted. The parties admit that the premises in controversy are within the exterior lines of said survey of said Eiler, Brown, and Rector, respectively.

The defendant here closed his evidence.

The plaintiff, in rebuttal, read the depositions of witnesses tending to prove that the premises in controversy are within the town of Carondelet, as the same existed prior to December 20th, 1803; that all of the land between the common field and the river formed a part of the town prior to Decem-

ber 20th, 1803, and that no part of the land within the town was common during the Spanish government; but, on the contrary, all that had no owner was vacant land for future building lots, as the town enlarged by an increase of population. These statements, contained in the depositions of the plaintiff, were strongly corroborated by the testimony of several of the depositions of the defendant, read in evidence.

The plaintiff then read in evidence the survey of the out-boundary of Carondelet, dated November 14, 1853, established according to act of Congress of June 13, 1812, purporting to include all of the town lots, common field lots, and commons of Carondelet.

The plaintiff then read in evidence the connected plat of the town of Carondelet, compiled by the surveyor general of Illinois and Missouri. This plat shows the location of the town of Carondelet as it existed during the Spanish government, and it also shows that the premises in controversy are within the town, as it existed prior to December 20th, 1803.

The plaintiff then read in evidence the confirmations by the United States of town lots in the town of Carondelet, and the United States survey thereof, to the following persons respectively, to-wit:

1. The confirmation and survey thereof to John Eugene Leitensdorfer, under Baptiste Gamache, being survey No. 22, in block 51, on said connected plat.
2. The confirmation and survey thereof to Gabriel Constant, junior, under Amable Cartrand, being survey No. 45, in block 10, on said connected plat.
3. The confirmation and survey thereof to Joseph Leduc's legal representatives, being survey No. 12, in block 31, on said connected plat.
4. The confirmation and survey thereof to Bertholomey Berthold, under Paul Robert, being survey No. 59, in block 38, on said connected plat.
5. The confirmation and survey thereof to Joseph Menard, under Lambert Lajoie, being survey No. 72, adjoining the common field, on said connected plat.

The confirmations show that the lands therein confirmed, respectively, were town lots in the town of Carondelet during the Spanish government, and the surveys of the confirmations show the respective locations of the lands confirmed, which will appear by reference to the said connected plat.

The foregoing is all of the evidence offered by either party.

The plaintiff then asked the court to instruct the jury as follows, to-wit:

1. If the jury believe, from the evidence, that the deeds, plats, documents, and other papers, read in evidence by the plaintiff, are genuine; that the respective deeds read in evidence from Joseph Bombardier to Rufus Easton, from Rufus Easton to William Russell, from William Russell to Thomas Allen, and from Thomas Allen and wife to the plaintiff, are for the piece of land of which the premises in controversy form a part; that survey No. 125, read in evidence, includes said premises, they will find for the plaintiff, unless they believe, from the evidence, that said premises are a part of the common of Carondelet, confirmed as common to the inhabitants of Carondelet, by the act of Congress passed on the 13th day of June, 1812; or, unless they find as stated in instruction number five, given for defendant.

2. If the jury believe, from the evidence, that the premises in controversy are within the town of Carondelet, as said town existed prior to December 20th, 1803, then the survey purporting to be the survey of the common of Carondelet is no evidence to show that said premises ever was common.

3. If the jury believe, from the evidence, that the plat of the town of Carondelet, read in evidence by the plaintiff, is genuine, and that the land in controversy is within said town, then said plat is evidence to show that the land in controversy never was common.

The court gave said instruction 1, 2 and 3, but added the following words to said instruction No. 1, to which the plaintiff at the time excepted, to-wit: "Or, unless they find as stated in instruction numbered five, given for the defendant."

The plaintiff also asked the court to instruct the jury as follows, to-wit :

4. If the jury believe, from the evidence, that the confirmation and survey thereof to William Russell, under Joseph Bombardier, read in evidence by the plaintiff, are genuine, they are instructed that the boundaries of the land so confirmed and surveyed are uncertain, and the title attached to no land until a survey was made, and a survey by the United States was necessary in order to vest said title and ascertain said boundaries, and consequently no statute of limitations could run against the right of the plaintiff, or those under whom he claims, until said survey was made and approved by the surveyor general ; and as said survey was not made ten years before the time of the commencement of this suit, the rights of the plaintiff, and those under whom he claims, are not barred by any adverse possession of the defendant, or those under whom he claims.

5. If the jury believe, from the evidence, that the deeds, plats, documents, and other papers, read in evidence by the plaintiff, are genuine ; that the respective deeds read in evidence from Joseph Bombardier to Rufus Easton, from Rufus Easton to William Russell, from William Russell to Thomas Allen, and from Thomas Allen and wife to the plaintiff, are for the piece or parcel of land of which the premises in controversy form a part ; that survey No. 125, read in evidence, includes said premises, they will find for the plaintiff.

6. When the survey 125, read in evidence, was recorded and approved by the surveyor general, the title to the land therein described passed from the United States to the confirmee, or his legal representatives ; and the appeal spoken of, which was taken by the defendant to the commissioner of the general land office, and the subsequent action of the commissioner thereon, were of no validity, and did not in any manner affect any right or title that said confirmee or his legal representatives had in said land.

But the court refused to give said last mentioned instruc-

tions, Nos. 4, 5 and 6, and the plaintiff at the time excepted to the decision of the court in refusing to give the same.

The defendant then asked the court to instruct the jury as follows, to-wit:

1. If the jury believe, from the evidence, that, prior to the 20th of December, 1803, the land in controversy was used by the inhabitants of the village of Carondelet as a part of the common of said village, then the same was, by the act of 13th of June, 1812, confirmed to such inhabitants, and the plaintiff is not entitled to recover.

2. If the jury find, from the evidence, that the property described in the deed from Bombardier to Easton does not include the premises in question, then they will find a verdict for the defendant.

5. If the jury find, from the evidence, that the lot in question was a town lot, and had a definite and certain location prior to any survey made by the United States, and that the defendant, and those through whom he claims, for ten years next before this action was begun, had actual, continual possession of the premises in dispute, under exclusive claim of title thereto, then the plaintiff cannot recover.

And the court gave said last mentioned instructions, Nos. 1, 2 and 5, asked for by the defendant; and the plaintiff at the time excepted to the decision of the court in giving the same.

Whereupon the jury returned a verdict for the defendant; and afterwards in due time, after the trial herein, the plaintiff filed his motion for a new trial, for the usual reasons, and

13. Because, since the trial in said cause, the plaintiff has discovered new and material evidence, which he did not know of at the time of said trial, and which would establish the right of the plaintiff to recover the premises in controversy if a new trial be granted.

And in support of said motion for a new trial, and before the same came on for hearing, the plaintiff filed his own affidavit, and the affidavit of James S. Dougherty, and Joseph Indest. The plaintiff, in his own affidavit, said that "Since

the trial in the above cause, he has discovered four witnesses, to-wit, Joseph Indest, James S. Dougherty, and two others, whose names he cannot as yet ascertain, by whom he can prove that the premises in controversy in this suit were neither in possession of the defendant, nor any one under whom he claims, for a period of eighteen months or two years at a time between the year 1847 and 1857, but, on the contrary, were open, and not occupied by any one; that he did not know at the time of said trial that he could prove said facts by said witnesses; that he caused diligent inquiry to be made before said trial for witnesses to prove said facts, but could find none, nor did he know of any until he discovered said four witnesses, hereinbefore alluded to; that if a new trial be granted, he expects to be able to procure the testimony of said witnesses at the next term of this court."

James S. Dougherty says that he is "well acquainted with block No. 84, in the city of Carondelet, and that on or before the time of the survey of that part of said block which is included in the United States survey No. 125, he visited Carondelet frequently, and saw that lot; and he says that prior to the survey, for more than a year, it was vacant, and nothing on said premises."

Joseph Indest says "that on the 15th of May, 1854, he was deputy United States surveyor for Missouri, and executed on or about that day the survey in the town of Carondelet, numbered 125, under instructions from the surveyor general, and he says that he distinctly recollects that the south part of block 84, which was included in said survey, was vacant."

And when said motion for a new trial came on for hearing, the plaintiff read said affidavit in evidence, in support of said motion; but the court overruled said motion; to which the plaintiff at the time excepted.

A title under a confirmation by the act of 1812 is better than one under the act of 1816, and in so far as the instructions instituted a comparison between the titles of plaintiff and defendant they do so correctly.

The survey of the common of Carondelet having included

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the village, in which were many valid private claims, it must be understood that such claims were intended to be excepted from the common, and in this case the court properly left it to the jury to determine whether the particular premises in dispute were used by the inhabitants of Carondelet as a part of the common of that village, and on this subject the instructions given for the plaintiff leave him no ground of complaint whatever.

The instruction numbered 5, given at the instance of the defendant, correctly expressed the law as decided by this court, in the case of *Aubuchon v. Ames*, 27 Mo. Rep. 89, which was affirmed in the case of *St. Louis University v. McCune*, 28 Mo. Rep. 481, and *McCune v. O'Fallon*, decided at this term of the court. The plaintiff's instruction number 4, was therefore properly refused.

The instruction number 2, given for the defendant, adopts the same view taken by the plaintiff, as is shown by his instructions numbered 1 and 5. He has no right to complain of it.

The fifth instruction asked by the plaintiff was obviously wrong, and was properly refused, and the sixth was useless.

The plaintiff did not show himself entitled to a new trial upon the ground of newly-discovered testimony.

The affidavits show only that the newly-found witnesses would testify as to the continued possession of the premises in dispute. Upon this point testimony was given at the trial, and the defendant having by his answer set up continued possession as a defence to the suit, the plaintiff had long notice of such intention, and ample opportunity to hunt up such testimony on the subject as he desired.

As it concerned the possession of a lot in the city of Carondelet, many persons competent to testify, perhaps hundreds, must have known the facts as to the possession; and that the plaintiff did not find them and produce them at the trial, shows so great a lack of diligence as to forbid any indulgence to him on that account.

Judgment affirmed, Judges Bay and Dryden concurring.

Boyle v. Chambers.

JEREMIAH T. BOYLE, Respondent, v. CHARLES CHAMBERS
AND WIFE, Appellants.

Wife's Estate in Lands.—The husband cannot, in this State, by his deed, alien the estate of his wife in lands without her consent.

Evidence—Ancient Deeds.—Boyle v. Meegan, 19 How. 149, and Reaume v. Chambers, 22 Mo. 36, 53, cited and affirmed. Where the deed of a married woman was not executed in conformity with the law in force at the date of its execution so as to convey her estate, it will not become effective as an ancient deed from lapse of time.

Paraphernalia.—The husband could not, by the Spanish law, alienate the wife's paraphernalia property without her consent.

Appeal from St. Louis Land Court.

The facts of the case appear from the opinion of the court. The title and deeds upon which the question presented arose, will be found set forth at length in the case of Reaume v. Chambers, 22 Mo. 36.

R. M. Field, for appellants.

I. The deed of 1818 being more than thirty years old, and having been produced from the proper custody, was admissible in evidence without further proof. This rule of evidence is nowise affected by the circumstance that some of the parties labored under the disabilities of coverture. The rule is founded on the necessity suggested by the antiquity of the deed. (1 Gibb. Ev. 103; 2 Phil. Ev. 475; 1 Green. Ev. 570, 521.)

II. The execution of the deed from Mrs. Mallette is proved by her own testimony, as appears from the deposition.

III. By the Spanish law, the right was vested in the husband, upon his marriage, to convey the paraphernal property of the wife with her consent. This right was not taken away by the introduction of the common law. (1 Dom. Civ. Law, § 884; 4 Partida, Tit. 11, L. 17; Schmidt, Span. Law, 81; Escriche, Dict. voc. *Bienes parafernales*; Lindell v. McNair, 4 Mo. 380; Moreau v. Detchmندی, 18 Mo. 522; Moss v. Allen, 27 Mo. 354.)

IV. By the rules of the common law, the deed of the hus-

band is effectual to convey the fee in the land of the wife, subject to be avoided only by the wife or her heirs; and in the present case no such avoidance is shown.

It is purposed to discuss some principles of the common law, applicable to the proposition contained in this refused instruction.

"If the jury find that the deed of Antoine Mallette to P. Chouteau was the deed of Antoine, and was made and delivered by him after intermarriage with Angelique Moreau, then said deed operated to pass to Chouteau the wife's interest in the land therein described, subject to be avoided by the wife; but that the deed of the sheriff is not sufficient to avoid the estate so passed to Chouteau."

In the case of *Norcum v. Sheahan*, 21 Mo. 25, the question was, whether the deed of the husband could, during the continuance of the coverture of the wife, be avoided by another deed of the husband and wife. It is held that it could be so avoided. But it is the unanimous opinion of the court that the deed of the husband, alone, had passed the wife's estate.

It will be observed that although in that case the wife had, in fact, joined in the deed, yet, on account of her non-age, her execution was a nullity; and that the argument and opinion are based upon the proposition of the deed being the sole deed of the husband. By that deed, says Judge Scott, (p. 29,) the estate of the wife "did pass—it conveyed a defeasible estate in fee; and had it never been defeated, their vendee's title would have remained valid."

The case at bar essentially differs from *Norcum v. Sheahan* in the material fact that Angelique Mallette has never exercised her privilege of avoiding the deed of her husband. The plaintiff, unlike *Norcum*, does not claim by a subsequent conveyance from the wife. On the contrary, he claims in spite of her. He claims to have her estate by a transfer *in invitum*. This radical distinction in the facts of the two cases should be observed whenever the ruling in *Norcum v. Sheahan* be applied to the case at bar.

Although the well-established principles of the common law, upon which depends the proposition presented by the instruction, have been recognized by this court in several cases, yet they are of such unfrequent application in practice that the recollection of the court will be asked to some elementary learning. Nor can such reference be useless in any case, as, according to Mr. Preston, in no science, so much as in that of the law, is a recurrence to first principles so necessary for the formation of correct conclusions.

a. What estate has a husband in the lands of his wife?

It is commonly said that he has a life estate. This description of his interest is not confined to the unlearned. It is frequently used by lawyers of the present day, and has crept upon the bench. In *Norcum v. Sheahan*, the late judge of the Common Pleas instructed the jury that by marriage the husband became tenant for life, with remainder in fee in the wife, of the lands of the wife,—thus depriving the wife, by the fact of marriage, of all estate of present enjoyment in her own land, and ignoring the familiar law that a remainder can only be created by deed, and never by act of law.

This court reversed the Common Pleas, and decided (p. 28) that the husband, by the marriage, became “seized of a freehold estate in his wife’s land,” by which is to be understood a freehold of inheritance, or in fee. When we examine the language of accurate law writers, from Littleton to Kent, we find this description of the estate: “Husband and wife are seized in fee, in right of the wife.” If other terms are used to express the quantity or quality of this estate, they are synonymous: for instance, “Husband and wife are seized jointly in fee for and during the coverture.”

The relation of husband is created by the fact of marriage. If the wife die, living the husband, his estate in her lands is at an end. A husband, therefore, as such, has no estate for his life in the lands of the wife. If issue be born of the marriage, his estate does not determine by her death; but the common law does not recognize him as tenant for life. It constructed a paraphrase to describe his interest, and to this

day we have the ancient estate of tenancy by the curtesy of the laws of England. Herein we see the care which the sages of the law had, to prevent those erroneous conclusions which ever flow from the use of inaccurate terms. All the concomitants of an estate, independent of the heir, are visible, and he is said by the ancient law writers to hold of the lord paramount. So, in our system, a similar principle obtains. Our statute of descents excepts the widow's dower; the course of descents is designated subject thereto; no exception is made of the husband's curtesy, yet curtesy survives the statute.

"By the intermarriage," says Roper, (Roper on H. & W., p. 3,) "the husband acquires a freehold interest during the joint lives of himself and wife, in all such freehold property of inheritance as she was seized of at that time, or may become so, during the coverture."

"If," says Coke, (Co. Litt. 67 a,) "the husband hath issue by the wife, then he is entitled to an estate for term of his own life, in his own right; and yet he is seized in fee, in right of the wife, so as he is not bare tenant for life."

In Polyblank v. Hawkins, (Doug. 314, 1 Saunders, 253 n,) the husband had declared that he was seized in his demesne as of freehold in right of his wife. The court, upon demurrer, held that he should have declared that "he and his wife were seized in their demesne as of fee in right of the wife." The same is stated in 1 Bacon's Abr. 695; and such will be found the view entertained of the husband's estate in all well-considered modern cases.

The merging of the wife in the husband is complete. If an estate in fee be given to a man and his wife, they are neither properly joint tenants nor tenants in common; for husband and wife being considered as one person in law, they cannot take the estate by moities, but both are seized of the entirety, *per tout, et non pour mie*: the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor. And if a grant is made of a joint estate to

husband and wife and a third person, the husband and wife shall have one moiety and the third person the other moiety, in the same manner as if it had been granted to two persons. So, if the grant is to husband and wife and two others, the husband and wife take one-third in joint tenancy, (2 Black. Com. 282).

That an estate may be defeated, or is to determine upon some future event, does not seem to vary its quantity during its continuance. "He (says Coke, Co. Litt. 18 *a*) that hath a fee simple, conditional or qualified, hath as ample and great an estate as he that hath a fee simple absolute; so that the diversity appeareth between the quantity and quality of the estate."

b. What is the effect, on the estate of the wife, of the alienation, by the husband, of her lands?

It seems that, at the earliest known period of the common law, the estate of the wife could not be, in any manner, aliened so as to bar herself or heirs. This was a consequence of the legal extinction, by marriage, of the woman. She was deemed incapable of performing any act to affect her rights; and her joining in a feoffment with her husband, was, as to her, a nullity. But the necessities of men have, in all ages, broken down all restrictions on the free alienation of lands, and so in this case, the rule of common law was overcome by a fiction. When it was desired to transfer her lands, the bargainee brought a suit, setting up a fictitious title thereto. The wife appeared in court, and being privily examined by the judges, and acknowledging that she had no defence to make to the suit, and no defence being made by the husband, judgment was rendered for the claimant. This proceeding became the common mode of assurance, and being recognized as such, a tax, or fine, per acre, for every alienation was levied for the king's use. Such is, in brief, "a fine."

But, although it was by the tedious and costly method of a fine that husband and wife could alien the lands of the wife so as effectually to bar her and her heirs, yet the common law (says Roper on H. & W., p. 55) imparted to "the husband

as a necessary incident to the seisin he acquired of the wife's freehold estate by marriage, a power by alienation, of converting her interest in it to a mere right; for the property of the wife during the coverture being vested in her and her husband *indivisibly*, he acquired the right of possession, which, being conveyed away by him, the wife was not allowed, from the unity of their estate and interest before described, to consider the act of her husband a disseisin of herself which might be defeated by mere entry, but she was permitted to contest the right only."

The husband, says Kent, (2 Com. 133,) "cannot alien or encumber the lands of the wife, if it be a freehold estate, so as to prevent her or her heirs, after his death, from enjoying it, discharged from his debts and engagements. But, from the authorities when closely examined, it seems that the husband has the power to transfer the whole estate of his wife, and the estate will be in the alienee of the husband, subject to the right of entry of the wife or her heirs."

In the recent American case of *Lewis v. Cook*, 13 Iredell, 195, the facts were similar to those of the case at bar. A deed purporting to convey the wife's land was a nullity as to the wife; and a similar ruling had been made at the trial, upon the theory that the deed of the husband had passed an estate only for his life. The reporter's note of the case is in these words:

"When one takes a conveyance in fee, with covenant of warranty, from a husband and wife, and the title of the wife does not pass in consequence of the want of her privy acknowledgment, yet the bargainee takes an estate in fee, as to all the world, except the wife and those claiming under her, not barred by the statute of limitations."

The decision of the court is substantially in this language:

"It is not true that the vendee of the husband had an estate for the life of the husband; he was seized in fee. The terms of the limitation was to him, his heirs and assigns; and notwithstanding the fact that it had an infirmity, and might be put an end to by reason of a defect in the title, still it was

a fee simple. It was good until the death of the husband, and then it was only wrongful as to the wife or her heirs. Suppose the vendee had died seized, could there be a question that his wife was entitled to dower? His estate, like that of the vendee, would be good against every one, except the wife or her heirs."

In *Norcum v. Sheahan*, this court said, (21 Mo. p. 29): "The deed of Vasquez and wife, (null as to the wife,) conveyed a defeasible estate in fee, and had it never been defeated, their vendee's title would have remained valid."

The control of the husband over the lands of the wife also appears in another direction. Thus, if a married woman levy a fine as a femme sole, it will be binding on her and her heirs if the husband in his life-time does not avoid it; but he can at any time defeat the fine of his wife. (1 Roper, H. & W., p. 141; Comyn's Dig., title, Fine.)

The position that a bargain and sale did not operate on the estate of the wife, although stated by Judge Scott, in *Norcum v. Sheahan*, is immediately dissipated by his own decision. "At common law, any alienation by husband seized in right of his wife was a discontinuance to his wife and her heirs." 3 Thom. Coke, p. (113,) * top p. 91. Whenever conveyances, operating under the statute of uses, which are commonly said to be innocent conveyances, have a warranty annexed, then such conveyances are as potent to effect a discontinuance as a feoffment, and these other alienations which are commonly said to be wrongful. Note A, to 3 Thomas' Coke, p. (92). *

c. In what manner can the defeasible estate of the husband's alienee be avoided?

At the common law, when the husband had aliened the wife's land, and died, the wife could neither enter upon the

* The statute of Henry, usually called the statute "against discontinuances," does not alter the effect of the husband's alienation. It only remedies the wrong by enabling the wife to avoid it, in a simple and summary manner. But, notwithstanding the statute, the estate is in the alienee of the husband till the avoidance. See, upon this point, 1 Preston on Abstracts of Title, 335, where a compendium of the law respecting the alienations by husbands will be found. See, also, 1 Bac. Abr. 724.

land, or maintain an ejectment for its possession; but in order to avoid the alienation of her husband, she had to bring her writ of right to revest her estate. The statute of Henry obviated the necessity for such action upon the right, and enabled her to avoid the alienation of her husband by either an actual entry or a writ of entry.

"She was," says Kent, (2 Com. 133,) "driven at common law to her writ of right, as her only remedy; but Lord Coke says he found that in the times of Bracton and Fleta the writ of entry *cui in vita* was given to the wife, upon the alienation of her husband, and this was her only remedy in the age of Littleton. That writ became obsolete after the remedial statute of 32 Henry VIII., c. 28, which reserved to the wife her right of entry, notwithstanding her husband's alienation."

Also, let us observe, that neither by any common law mode of conveyance, nor by any conveyances operating under the statute of uses, was any alienation permitted of lands in the adverse possession of another.

Our statute, therefore, which obviates the necessity for entry in order to convey lands of which the possession has been lost to the owner, and gives to all conveyances the like effect, as if the party making such conveyances was in the actual possession thereof, would seem to enable Mrs. Mallette to avoid the alienation of her husband by a simple act of conveyance. This is conceded. But it is denied that, until she has done some act effectual to avoid the estate of her husband's alienee—either by the common law, the statute of Henry, or by our statute—that she has any estate or interest in the land, vendible by execution.

"When a man may enter or claim, the law will not adjudge him in possession till entry or claim." (1 Coke, R. 94, *Shelly's case*; Co. Litt. 218 *a*; 2 Coke, R. 536.)

"For till entry it doth not appear; having power at his election to void or continue the estate, which he will do." (Note 3 to Co. Litt. 218 *a*; Litt. § 351.)

Instances are frequent in the law, in which estates depend

upon the exercise of the will of a woman discover of baron. If a husband makes an exchange of the lands of his wife for other lands, this exchange, after his death, can be avoided by the wife, but until she avoids the exchange she has no estate in her original parcel. (Co. Litt. 51 *a.*) So, when the husband aliened the lands of the husband and wife, and took back an estate tail, until her election, after the death of her husband, to defeat the entail, she had no estate in fee simple. (Co. Litt. 357 *a.*) So, although a femme covert cannot, strictly speaking, purchase lands, yet if she does, and although the husband agrees to it, still, after his death, she can waive the purchase. (Co. Litt. 3 *a.*)

So, Mrs. Malette, having no estate in the lands aliened by her husband, but a privilege, personal to herself, of defeating the act of her husband, or of agreeing to it during her life; and so, permitting her heirs after her death to agree or not as they choose, cannot be compelled by an execution creditor to make her election. Even if she do not see fit, by her own deed, to secure the alienee of her husband against all contingencies, no one can compel her to occupy an attitude perhaps repulsive to her sense of justice or respect to her husband.

The principle here involved has frequently been recognized by this court. The case of *Bower v. Higbee*, 9 Mo. 260, was this: Higbee had trespassed on land to which one Eiler was entitled to a pre-emption. Eiler had leased the land to Bower, which was a void act, but the court arrive at the discussion of the principle now involved by assuming the contrary.

"What," says Judge Scott, "is a pre-emption right? Is it any interest in the land? Is it certain that the party entitled to it will ever avail himself of it? Until he does, there is certainly no surety that he will ever acquire any right. *** A pre-emption is nothing but an offer by the government to an individual settled on the public lands, which he may or may not accept. *** That he will accept may be presumed, but still an absolute certainty that he will accept, when the time for acceptance comes, will not confer any right until an

acceptance is actually signified in the manner prescribed by law."

Now, what is a right of avoidance? Is it any interest in the land? Is it certain that the party entitled to it will ever avail herself of it? No right to avoid—no presumption that she will avoid—will confer any estate or interest in the land until an avoidance be actually exercised.

On this head, further reference may be had to 2 Preston on Abstracts, 204; 3 do. 25; Wivel's case, Hob. 45; 3 Durn. & East. 355; Bartlett v. Glascock, 4 Mo. 62; Hatfield v. Wallace, 7 Mo. 112 & 10 Mo. 398; Brant v. Robertson, 16 Mo. 129. In the latter case, Judge Gamble states (16 Mo. 149) the proposition:

"When parties have bound themselves by agreement to convey land and to pay for it, equity recognizes an interest in the land as already in the purchaser, and the case is the stronger when the purchaser has actually paid in whole or in part; and in either case the interest of the purchaser may be sold on execution, on the principle that the vendor is to be regarded as seized in equity to the use of the purchaser. But if no money has been paid, and if the person who may have become the purchaser is not actually under any obligation to pay, then there is no seisin in the seller, even in equity, to the purchaser's use, and there is no interest in the land which is liable to sale on execution."

In the recent case of Vancourt v. Moore, 26 Mo. 96, this court went much further than it is, for the purpose of this case upon any view of it, necessary to go. "The fourth section of the act concerning conveyances," says Judge Scott, "empowers any person claiming title to any real estate, notwithstanding there may be an adverse possession thereof, to sell and convey his interest therein in the same manner, and with the like effect, as if he was in the actual possession. It is conceived that this provision does away with that rule of the common law which required a grantor of land to be seized thereof, when he makes his deed of conveyance, in order that his covenant of warranty may attach to, and run with, the

land. This section was introduced to enable persons having claims to land without possession, or even in case of adverse, possession, to alien such lands as though they were seized thereof. But, whilst the law thus enables individuals to dispose of their claims to real estate, and thus to affect themselves by their conveyances, there is nothing which authorizes the courts, or the officers of the law, to sell or convey such claims. If there is no title, nor any interest, nor any possession in a judgment debtor, in cases without the influence of the registry laws, there is no power in the officer to sell a mere claim under an execution. There being nothing on which the sale can operate, it is ineffectual for any purpose, and it is as though it had not been made."

S. T. Glover with *Munford*, for respondent.

I. The title of the plaintiff was perfect to two-thirds of the land sued for. See *Boyle v. Meegan*, 19 How. 130, where all the facts, and all the law, are discussed and settled; and 22 Mo. 36, *Reaume v. Chambers*.

II. When one tenant ousts another, an ejectment lies in favor of him who is ousted of his part. This is admitted on the other side. But it is denied that, in such case, any damages can be recovered. But if an action lies, why cannot damages be recovered? If you can recover the land, you can recover the damages. (R. C., p. 692, § 12.)

BATES, Judge, delivered the opinion of the court.

This suit is an action, in the nature of ejectment, to recover two-fifths of a forty arpen lot, in the common field of St. Louis, confirmed to the representatives of Francis Moreau, by the act of 29th April, 1816. Both parties claim under Moreau. The plaintiff derives title by sheriff's sale, on execution, under a judgment against Angelique Mallette, Pierre Wilhelmine and Melaine Cené his wife, and Felix Pingal and Josephine Cené his wife. Angelique Mallette was a daughter of Francis Moreau, and the wives of Wilhelmine

and Pingal were daughters of Helen Cené, deceased, who was also a daughter of Francis Moreau, deceased. The defendants relied upon a supposed deed from Antoine Mallette and said Angelique his wife, and Pierre Cené and said Helen his wife, and other descendants of Francis Moreau, to Pierre Chouteau, which deed, and the circumstances attending its execution, will be found at large in the case of Reaume v. Chambers, 22 Mo. Rep., p. 39 and following. Before offering that deed in evidence, the defendants, to prove the execution of it, gave in evidence the deposition of Angelique Mallette, as follows :

Deposition of Angelique Mallett, a witness of lawful age, produced, sworn and examined, at the residence of Pascal Mallett, in the county of St. Clair, and State of Illinois, before me, Theodore Engelmann, a notary public within and for the county of St. Clair, and State of Illinois, in a certain cause now pending, in the St. Louis Land Court, in the State of Missouri, between Jeremiah T. Boyle, plaintiff, and John Sexton, defendant, on the part of said defendant.

The witness being French, not understanding the English language, Francis Lemay was sworn to interpret the questions put to her into the French language and her answers thereto into English ; and the deposition was taken through him as interpreter. The witness deposes and says, to

Interrogatory 1. State your age, name, and place of residence. *Answer* 1. My name is Angelique Mallette ; I am about sixty-seven years old ; reside with Pascal Mallet, in St. Clair county, Illinois.

2. How often have you been married ? Name your husbands. *Ans.* I was married but one time, to Antoine Mallette.

3. Whose child are you ? Give the name of your parents. *Ans.* I am the child of Francis Moreau.

4. Name your sisters. *Ans.* Lisette Moreau, Mary Moreau. Lisette was married to Menard ; Mary was married to a man by the name of Caieu ; Ellen and myself are twins ; Ellen was married to a man by the name of Pierre Sné (Cneay).

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5. Had Francis Moreau, your father, any tract of land in St. Louis county? If so, state where it was. *Ans.* I never knew it from him; we were too young when he died.

6. Was any tract sold by his heirs to any body? If so, to whom? *Ans.* No, sir.

7. Did Pierre Chouteau ever? (Withdrawn.) Since your father's death, did you ever sell your right to any tract of land as his heir? (Objected to as leading.)

8. Have you ever heard of any tract of land in St. Louis county, belonging to the heirs of Francis Moreau? (Objected to by counsel for plaintiff as leading and incompetent.) *Ans.* I heard something about it; it was so recorded; one of the sisters stated to me we had some land over there, but did not know where it was.

9. What sister stated so to you, and when? *Ans.* I cannot say, it is so long ago; it is about eighteen years since she died, and it was some time before that.

10. Did you or your sister do anything about that land? *Ans.* No.

11. Did Peter Sné own any lot in St. Ferdinand? *Ans.* Yes.

12. From whom did he get it? *Ans.* I understood he had it from Mr. Cadet.

13. Whom do you mean by Mr. Cadet? *Ans.* Never heard any other name but Mr. Cadet.

14. What was the name of the family of Mr. Cadet of whom you speak? *Ans.* I do not know; Mrs. Berthal is a daughter of Mrs. Cadet; she is an old woman.

15. Do you know why Mr. Cadet sold this lot in St. Ferdinand to Mr. Sné? *Ans.* He exchanged it for a piece of land.

16. State all you know about that exchange. *Ans.* I know nothing of it.

17. State what piece of ground it was that he exchanged for it. *Ans.* I do not know; I do not know where it is.

18. Did Peter Sné ever speak to you about it? *Ans.* He spoke to my husband about it.

19. What was said, and what was done about it? *Ans.* Mr. Sné came there with another man, I understood, to make an exchange of land.

20. What had you and your husband to do with it? Go on and tell all that occurred. *Ans.* Mr. Sné came there with another man and made me sign a paper, and I do not know what they have done afterwards.

21. What was that paper about? *Ans.* I signed it for Mr. Sné, to make an exchange of a house and lot.

22. Where was that house and lot? *Ans.* I cannot tell the place at present; I think it may have been at Florissant.

23. What was the piece of land she and her husband exchanged for the house and lot of land at Florissant? *Ans.* I do not know.

24. What were your rights to the piece of land which you exchanged? *Ans.* If I had anything it had come to me.

25. How had they come to you, and from whom? *Ans.* I do not understand.

26. Had you inherited or acquired the right you sold? *Ans.* The land came from my father.

27. Where did you understand that land to lie? *Ans.* I do not know where that land was.

28. Have you ever heard where it lay? *Ans.* I have not.

29. Did your husband sign it at that time? *Ans.* Yes.

30. Did any other person sign that paper? *Ans.* I heard that others signed it; but I do not know.

31. Who else did you hear signed it? (Objected to by plaintiff's counsel as leading and incompetent.) *Ans.* I understood that my brother, and my sister, and my niece, signed it; but do not know it.

32. Give the names of those you heard of having signed it. (Objected to by plaintiff's counsel as leading and incompetent.) *Ans.* Joseph Moreau, Mary Moreau, and Leonore Menard, my niece.

33. What did you say just now about Madam Ortice and Madam Colin? *Ans.* I understood that they also signed it, but do not know.

34. From whom did you hear that Mary Moreau signed it?
Ans. By Mr. Sné.

35. From whom did you hear that Leonore Menard signed it? *Ans.* By Mr. Sné, and no other person.

36. From whom did you hear that Madam Colin signed it? *Ans.* By Mr. Sné, and no person else.

37. From whom did you hear that Madam Ortime signed it?
Ans. Mr. Sné told me they had signed it; nobody else.

38. Did any of these claim the land after the exchange?
Ans. No, sir.

39. How long ago was this exchange? *Ans.* I do not know; cannot recollect, it is so long ago; I think about thirty years—may be more; Emilie, the wife of the interpreter, was not born.

40. Did you know John Mullanphy? *Ans.* Yes, the old man, the father of Mr. Chambers, I knew.

41. Did you know him very well, or see him often? *Ans.* I knew him and saw him often.

42. Did you ever speak to him about this land? *Ans.* I did not know he had it; never heard him speak about it; I have heard of it since.

43. Did you or your husband ever claim it after the exchange? *Ans.* No.

44. Were you on good terms with Mr. Mullanphy? *Ans.* I had nothing against him, and think the other party had nothing against me.

45. Did you get goods from his store, and were they always paid for; and if so, how? (Objected to as leading and incompetent.) *Ans.* He was giving not only to myself but to all the poor.

46. How long did this continue, in regard to yourself? *Ans.* He might have given me a hundred dollars' worth at different times during the year; perhaps more than a year, as far as I can recollect.

47. When was this? *Ans.* When I got married he gave me some money; and when he went to France he left me a dollar's worth to get every week at the store, as he did to

other poor orphan children; this was about thirty years ago.

48. Do you know how to read or write? *Ans.* No.

49. Have you made any other deed except the said deed of exchange? *Ans.* No other; only with Mr. Sné.

50. Do you know Fremont and Reber? *Ans.* Yes.

51. Did you ever make them any act? If so, what? *Ans.* Yes; I made a deed to Mr. Fremont and Reber.

52. What was that deed for? *Ans.* I do not know.

53. How came you to make that deed to Fremont and Reber? *Ans.* They told me I had a piece of land, and I gave it to them to plead in half, and afterwards I sold it to them.

54. Did you sell all your interest in the same to them? *Ans.* Yes.

55. Were you to receive nothing in case they gained the suit? *Ans.* Mr. Fremont told me if he gained the land, he would give me a good recompense.

56. Did you ever sign more than one *act* to Fremont and Reber? *Ans.* No, sir.

57. Did Fremont and Reber tell you who claimed the land? *Ans.* No.

58. Was the land sold to Fremont and Reber the same as in the exchange? *Ans.* I believe, yes.

59. Did you know this at the time you made the *act* to Fremont and Reber? *Ans.* No.

60. Did you ask any questions about this, when you made the *act* to Fremont and Reber? *Ans.* I do not recollect. Did you ask whether it was the land sold to Mr. Cadet? (Objected to as leading by plaintiff. Withdrawn.)

61. Did you ask Fremont and Reber any question about what land it was? If so, state all that passed. *Ans.* They said it was land that never was sold. I do not recollect anything.

62. Did you understand that it (the land) was *la grange de terre*? (Objected to by plaintiff's counsel as leading.) *Ans.* I do not recollect. *Ques.* Was suit to be brought for the land by Fremont and Reber? (Objected to by plaintiff's counsel as leading. Withdrawn.)

63. What was Fremont and Reber to do with said land?
Ans. They did not tell me; I do not know what they were to do with it; if they had gained it, I suppose it would have been theirs.

64. Who were to sue for it? *Ans.* I have heard nobody say who was to sue. *Ques.* Was not suit to be brought? (Objected to by plaintiff's counsel as leading. Withdrawn.)

65. In whose possession was the land which you sold to Fremont and Reber? *Ans.* I do not know; they had not told me who was in possession.

66. Were you in possession or not? (Objected to as leading.) *Ans.* No.

67. What do you mean when you say that it would be Fremont and Reber's when it was gained? *Ans.* It would belong to them; they bought it and it would be theirs.

68. What do you mean by "its being gained"? *Ans.* I do not understand.

69. How was it to be gained? *Ans.* By going to law.

70. Who was to bring that suit, and at whose expense?
Ans. I think it was at their expense; I had sold it to them, and they were to plead it for half and to pay all expenses.

71. Were you ever asked to pay the costs of the suit brought for that land? *Ans.* No.

Cross-examination by plaintiff's counsel.

Cross-interrogatory 1. The paper which you say you and your husband signed, was it not to Mr. Sné? *Ans.* Yes.

2. Did you ever sign any paper to Mr. Chouteau? *Ans.* No; never saw Mr. Chouteau; did not know him at that time.

3. Did you ever sign any paper to Mr. Cadet? *Ans.* No.

4. Did you ever sell any land, or make any act, either to Mr. Cadet or to Mr. Chouteau? *Ans.* I have never sold nor made any contract to Mr. Cadet or Mr. Chouteau.

Re-examined by defendant's counsel.

Interrogatory 1. Did you or your husband not receive ten dollars for some land sold to Mr. Chouteau or Cadet? (Objected to by plaintiff's counsel as leading.) *Ans.* Not Mr.

Chouteau or Mr. Cadet, but Mr. Sné, has paid five or ten dollars to my husband.

2. Was this sum you received for the exchange of land, or for a different transaction? (Objected to by plaintiff's counsel as leading and incompetent.) *Ans.* It was, and I do not know how Mr. Sné arranged it afterwards; I made a deed to Mr. Sné, and I do not know how he arranged it afterwards; at that time the land was not worth much; I did what my husband said, and do not know how he fixed it with Mr. Sné; Mr. Sné got a house and lot in St. Ferdinand from Mr. Chouteau.

3. Was Mr. Sné to give you a house and lot in St. Ferdinand? (Objected to as leading.) *Ans.* No.

4. To whom was the house and lot in St. Ferdinand to belong for which the exchange was made? *Ans.* To Mr. Sné.

5. To whom did you understand the land was to belong for which you signed the paper for Mr. Sné? *Ans.* I signed for Mr. Sné, and I think it ought to belong to him.

6. Between what two persons was this exchange made? *Ans.* Between Mr. Sné; Mr. Sné was there with another man; I do not know who he was.

7. With whom did Sné exchange this land? *Ans.* I know he got a house from Mr. Cadet, but do not know how he arranged it with him.

8. Was not this house and lot from Cadet given in exchange for the land you sold? (Objected to by plaintiff's counsel as leading.) *Ans.* I do not know how they fixed it between them.

9. Was this the same paper signed by your sisters and brothers, spoken of by you before. (Objected to by plaintiff's counsel as leading.) *Ans.* Mr. Sné told me they had to sign it, but I never saw it.

10. Have you not said, that Mr. Sné got this house and lot as pay from Mr. Cadet for procuring your signature to the sale of your father's land. (Objected to by plaintiff's counsel as leading and incompetent.) *Ans.* No.

11. Did you ever sign any other deed for said land, except

the paper to Sné, before that to Reber and Fremont? No; except one to Mr. Clemens.

ANGELIQUE MALLETTE, + *her mark*.

The deed having been offered in evidence, it was, on objection made by the plaintiff, excluded as to Angelique Mallette, Helen Cené, and Marie Colin, and admitted as to the others. The defendants also gave in evidence a deed from Pierre Chouteau to John Mullanphy, under whom the defendants claim. The defendants moved the court to instruct the jury that said deed, if executed by Antoine Mallette, operated to pass his wife's interest in the land to Chouteau, subject to be avoided by the wife, which the court refused to do.

Mr. Field, the counsel for appellants, now makes these points: 1. That the deed of 1818, being more than thirty years old, and having been produced from the proper custody, was admissible in evidence without further proof.

2. That the execution of the deed by Mrs. Mallette is proved by her deposition.

3. That, by the Spanish law, the right was vested in the husband, upon his marriage, to convey the paraphernal property of the wife, with her consent, and that this right was not taken away by the introduction of the common law.

4. That, by the rules of the common law, the deed of the husband is effectual to convey the fee in the lands of the wife, subject to be avoided only by the wife or her heirs; and in the present case no such avoidance is shown.

I. As to the second point. The deposition of Mrs. Mallette does not prove her execution of the deed to Chouteau? If it prove the execution of any deed, it is of one to Pierre Cené, and not to Chouteau. No circumstances are shown to support the supposition that the deed was to Chouteau, and that, in exchange therefor, Chouteau conveyed a house and lot to Cené. If that had been the fact, doubtless it could have been shown by other testimony. The deed, therefore, remains unproved.

II. As to the first point. It was not admissible in evidence

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as an ancient deed. The Supreme Court of the United States has so held, in the case of Meegan v. Boyle, 19 How., on page 149. That case covers all the ground of this case, and is certainly entitled to the very highest respect, whether it be regarded as governing this case authoritatively or not. As the decision in that case was upon matters occurring in the Territory of Missouri before the establishment of the State, it may well be considered as of actual authority.

Judge Scott, too, in the case of Reaume v. Chambers, 22 Mo. Rep., at page 53, held that the principle upon which ancient deeds are held to prove themselves has no application to this case.

III. As to the third point. It is conceded that this property in the wives of Malette and Cené, was paraphernal property. Whether the husband may administer such property with the consent of the wife or by her appointment, it is not material to inquire, as it is not claimed that he can do so without her consent or appointment, and there is no evidence of either in this case.

IV. As to the fourth point. Mr. Field has shown great research into the ancient common law, in order to show what estate the husband has in the lands of the wife; what is the effect on the estate of the wife of the alienation by the husband of her lands, and in what manner the defeasible estate of the husband's alienee can be avoided.

Without consenting to the conclusion to which he has arrived, it is sufficient to say that it was never understood in Missouri that the husband could alien the estate of his wife in lands without her consent. All acts of the legislature of the Territory and of the State, and all decisions of the courts, which touch or affect the subject, deny, in some form, his right to do so. It is not the common law of Missouri.

So, considering the third and fourth points upon which the appellants rely for a reversal of the judgment, it is not necessary to give any opinion upon the vexed question whether the introduction of the common law, by the act of 1816, repealed the Spanish law, or in what manner it affected it.

Boyle v. Graham.—Davy v. Bompert.

For the purpose of this case, such an opinion is not required, and it is not supposed that the question is of any general importance.

A question was made as to the right of the plaintiffs as tenants in common with the defendants to recover damages against their co-tenants.

That question was not argued by the counsel of the appellants, because it was expected that it would be fully argued in some other case, in which the appellants are much more largely interested than in this case in which the amount of damages is but small. No opinion is, therefore, given on that question.

Judgment affirmed, the other Judges concurring.



JEREMIAH T. BOYLE, Respondent, v. RICHARD GRAHAM AND WIFE, Appellants.

Appeal from St. Louis Land Court.

BATES, Judge, delivered the opinion of the court.

This case is similar to that of Boyle v. Chambers, decided at this term, and for the reasons given in the opinion in that case the judgment is affirmed.

Judges Bay and Dryden concur.



FRANCIS DAVY *et al.*, Plaintiffs in Error, v. AURORA BOMPART *et al.*, Defendants in Error.

The evidence in the record does not show such error in the verdict as to authorize the court to interfere.

Appeal from St. Louis Land Court.

Morehead, for plaintiffs in error.

Davy v. Bompart.

Glover and Shepley, for defendants in error.

BATES, Judge, delivered the opinion of the court.

This is an action of ejectment for the possession of part of a tract of land in the former common field of the Prairie des Noyers, near the city of St. Louis.

The plaintiffs gave evidence of a confirmation by the act of Congress of 29th April, 1816, to Belestre's representatives, and of their being the heirs and representatives of Belestre.

The defendants claimed to be the representatives of Pierre Duchouquette, and gave evidence tending to prove a confirmation to Pierre Duchouquette by the act of Congress of 13th June, 1812. Some evidence was given that Belestre had cultivated the land prior to 1803, and also that Duchouquette succeeded him in the cultivation of the land, and also some evidence was given to show that Duchouquette claimed to hold by purchase under Belestre, and also some evidence to show that the lot cultivated by Duchouquette was a different one from that cultivated by Belestre.

The court, at the instance of the plaintiff, gave to the jury this instruction :

The court instructs the jury, if they find from the evidence that the land described in the petition was conceded by the Spanish Government to Pierre Belestre, and was surveyed for him by the Spanish authorities, and that he died about the year 1801, in the city of St. Louis, leaving no lawful issue, and that he had cultivated and possessed the same prior to, and was the rightful owner thereof at the time of his death, and that said land was confirmed to his representatives by the act of Congress of the 29th April, 1816, and was surveyed to them by the United States authorities, and said survey duly approved, and that the plaintiffs are lawful heirs of said Pierre Belestre, they must find their verdict in favor of the plaintiffs according to their respective rights and interests in said land as such heirs, unless they further believe from the evidence that the same land was cultivated or possessed by Pierre Duchouquette, after the death of said Pierre Belestre,

and prior to the 20th December, 1803, under a rightful claim.

The court, at the instance of the defendant, gave to the jury two instructions :

If the jury believe from the evidence that Pierre Duchouquette cultivated and possessed, prior to the 20th day of December, 1803, a lot of two arpens in front by forty in depth, by himself or his agents, claiming to own the same ; that the lot in controversy is included within said lot of two by forty arpens ; that said lot of two by forty arpens was one of a range of lots adjoining and a dependency of the town of St. Louis ; that said Duchouquette was an inhabitant of said town of St. Louis at the time of said cultivation and down to said 20th day of December, 1803, and that said Pierre Duchouquette was the last cultivator of said lot, they will find for the defendants.

Verdict and judgment were given for defendants.

There is no error in any of these instructions, and, in fact, the argument here made is that the jury made a mistake and applied to the lot in dispute, testimony given as to the possession of another and different lot. That may be so ; but the record does not show it so clearly as to authorize this court to interfere with the verdict.

Judgment affirmed. Judges Bay and Dryden concur.

JOHN HOGAN, Plaintiff in Error, v. DANIEL D. PAGE, Defendant in Error.

Confirmation.—A confirmation by the board of commissioners under the act of Congress of March 3d, 1807, is a better title than a confirmation by virtue of the 1st section of the act of June 13, 1812.

Enurement.—Hogan v. Page, 22 Mo. 55, affirmed. When the board of commissioners, under the act of Congress of March 3d, 1807, issued a certificate of confirmation to the legal representatives of the grantee under the French Government, and not to the party who presented the claim, the certificate does not enure to the benefit of the claimant unless he prove himself to be the assignee or legal representative of the person in whose name the certificate issued.

Hogan v. Page.

Appeal from St. Louis Land Court.

This was an action of ejectment, brought by Hogan against Page, in the St. Louis Land Court, for a portion of a common field lot of one by forty arpens in the St. Louis Grand Prairie. The answer of defendant admitted that at the time of the institution of the suit he was in possession of nineteen ninety-sixth parts of the premises sued for.

The plaintiff gave in evidence the following confirmation papers :

To Frederick Bates, Esq., recorder of land titles for the Territory of Louisiana. Sir: Take notice, that I claim a tract of land situate in Big Prairie, district of St. Louis, formerly the property of Mr. Condé, containing one arpent by forty arpens, as appears by the concession remaining in your office, Book No. 1, page 31.

St. Louis, 23d May, 1808. LOUIS LEMONDE, X *his mark*.
(See Book D, page 165.) Witness—M. P. LEDUC.

(Cert. 1276.)

Wednesday, November 13, 1811.

Board met. Present—John B. C. Lucas, Clement B. Penrose, and Frederick Bates, commissioners.

Louis Lemonde, assignee of Auguste Condé, claiming one by forty arpens of land situate in Big Prairie, district of St. Louis, produces a concession from St. Ange and Labuxiere, L. G., dated 10th January, 1770. The board grant to the representatives of Auguste Condé forty arpens of land under the provisions of the 2d section of the act of Congress entitled "An act respecting claims to land," and passed 3d March, 1807, and order that the same be surveyed conformably to possession, (survey at the expense of the United States,) as ascertained by report of survey dated as above, 10th January, 1770.

Board adjourned till to-morrow, nine o'clock A. M.

JOHN B. C. LUCAS,
FREDERICK BATES,
CLEMENT B. PENROSE.

(See minutes of the board, Book No. 5, pages 398, 399 & 407.)

Translation of grant to Condé preceding the foregoing:

(*Condé.*) The 10th January, 1770. Upon the demand of Mr. Auguste Condé, surgeon in St. Louis, we have conceded and we do concede to him, his heirs and assigns, in fee simple, a tract of land situated in the Grand Prairie of the said village of St. Louis, containing two arpens in width by forty arpens in depth, bounded on one side by the land of Mr. Hervieux, and on the other side by the land of Louis Dehêtres, in order that himself, the said Condé, and his representatives, may enjoy the same in full property, under the conditions to settle the said land within one year and a day; and that the same is to remain liable to the public and other charges which his majesty may be pleased to impose thereon.

Given in St. Louis, the said day, and we have signed.

LABUXIERE.

The following is a copy of the receipt on file in the office of the recorder of land titles for the confirmation certificate No. 1276:

Received, St. Louis, January 27, 1825, of the recorder of land titles, the commissioners' certificate of confirmation No. 1276, relating to a field lot in the Big Prairie, St. Louis county.

LOUIS LEMONDE, *×* *his mark.*

Test—M. P. LEDUC.

Plaintiff next gave in evidence the U. S. survey No. 1276, from the office of the surveyor general of Illinois and Missouri, approved May 5th, 1851.

As there was no question of boundary or location in the case, it is unnecessary to set out this survey.

Plaintiff next proved that Angelique Raymond, Ann Fontaine and Baptiste Lemonde were the only surviving heirs of Louis Lemonde, and then offered in evidence a deed from

them to himself dated the 2d of March, 1850, the description in which was as follows: "All the right, title, interest and estate which we or any or either of us have or may have to a certain tract of land which the said Louis Lemonde, now deceased, but formerly a resident of said city and county and State, acquired, or claimed to have acquired, of Auguste Condé, formerly of St. Louis, now deceased, and which land was supposed to have been situated in the Grand Prairie in said county and State, but for which land said parties of the first part have never seen any deed from said Auguste Condé to said Louis Lemonde."

To the reading of this deed in evidence defendant objected on account of the vagueness and uncertainty of the description of the property which it purports to convey; but the court allowed the deed to be read, and defendant excepted.

Plaintiff then read in evidence the deposition of Madame Marian Baccanné to prove the cultivation and possession by Louis Lemonde of the common field of one by forty arpens, of which the *locus in quo* was a part, prior to the 20th December, 1803. He also proved that Auguste Condé was dead on the 13th January, 1778.

The defendant offered no evidence of any kind.

This being all the evidence in the cause, the plaintiff prayed the court to give the jury the following instructions:

1. If the jury find from the evidence, that, at the time the claim mentioned in the confirmation papers given in evidence by the plaintiff was presented to the board of commissioners for confirmation, Auguste Condé was dead, and that the same was presented by Louis Lemonde in his own right as the assignee of said Condé, and that the certificate of confirmation was accordingly delivered to said Lemonde, as such assignee and claimant as aforesaid, by the recorder of land titles, then the confirmation of said claim enures to said Lemonde.

2. If the jury find from the evidence, that, for ten consecutive years prior to the 20th day of December, A. D. 1803, Louis Lemonde had been in possession of the tract of land of which the premises sued for are a part, and that said tract

was not claimed by any other person, and did not exceed two thousand acres ; that said Lemonde on that day was resident in the Territory of Louisiana, and had still possession of such tract of land ; that the claim to said tract of land was presented by said Lemonde to the board of commissioners for confirmation, and that Auguste Condé was at that time dead ; that said claim was presented to the board by said Lemonde in his own right as assignee of Condé, and that the certificate of confirmation of said claim was delivered to said Lemonde, as such assignee and claimant as aforesaid, by the recorder of land titles,—then the confirmation of said claim enures to said Lemonde.

3. If the jury find from the evidence that the premises in possession of the defendant at the commencement of this suit are a part of a tract of land which was cultivated by Louis Lemonde prior to the 20th day of December, 1803 ; that said Lemonde was at the time of such cultivation an inhabitant of the town of St. Louis ; that said tract of land was situated in the Grand Prairie in the neighborhood of said town, and was used by said Lemonde for the purposes of cultivation, and was one of a series of lots of similar form and character also used by the inhabitants of said town for the purposes of cultivation, and lying adjoining each other in the same general range of lots,—then the claim of said Lemonde to said tract of land was confirmed to him by the act of Congress approved the 12th of June, 1812.

But the court refused to give these instructions, and the plaintiff duly excepted.

The defendant then asked the court to give the following instruction to the jury :

“The jury are instructed, that, upon the case as made by the plaintiff, he is not entitled to recover.”

Which instruction the court gave, and the plaintiff excepted.

The jury having found a verdict for the defendant, the plaintiff immediately filed his motion for a new trial, for the reasons—1. That the court gave the jury illegal instructions

at the prayer of the defendant; 2. That it refused to give the instructions prayed by plaintiff; and 3. That the verdict was against law and evidence, and the weight of evidence. But the court overruled the motion, and the plaintiff excepted.

The case was argued by *Lackland, Cline & Jameson*, on the printed brief prepared by Mr. Polk.

I. In making a presentation of this case to the court for the appellant, in order that his counsel may be the better understood, he does not follow the order in which the case stands before the court below, upon the instructions prayed.

The attention of this court is therefore invited, first, to the *third* instruction prayed by appellant's counsel, and refused by the court below.

That instruction is framed with reference to the first section of the act of Congress of the 13th of June, 1812. And the appellant's counsel contends that it is a correct exposition of the first section of that act. That upon the facts as stated in the instruction, a title was vested to the premises therein described, in Louis Lemonde. (*Harrison v. Page*, 16 Mo. 182; *The City of St. Louis v. Toney*, 21 Mo. 243; Act 13th June, 1812, 2 Story's Laws, 1257.)

II. There was evidence before the court and jury to warrant the appellant's third instruction.

But it may be objected, that, in consequence of the proviso of the first section of the act, no title could be vested in Lemonde, because of the confirmation by the old board.

It does not lie in the mouth of the defendant, a lawless trespasser, to make any such objection. (*See Macklot v. Dubreuil*, 9 Mo. 473.)

But the proviso itself, by its own words, limits the extent of its operation. It says that the act shall not affect the rights of any persons claiming the same lands-by virtue of a confirmation of the old board. It is confined exclusively to persons *claiming* the same lands by virtue of a confirmation by the old board. Such claimants, and they only, can set up

a confirmation by the old board against a confirmation by the first section of the act of 1812.

But defendant did not claim the same land by a confirmation of the old board. And nobody claiming under Condé objected to the plaintiff's title under the act of 1812. Indeed, the plaintiff claimed that the confirmation by the old board enured to himself as the assignee of Condé; he claimed himself the same land by virtue of the confirmation of the old board, and he was the only person claiming it by that confirmation.

III. The first and second instructions prayed by the plaintiff both have reference to the confirmation of the old board and to the act of Congress of the 3d of March, 1807, and ought to have been given by the court.

The second is more full and comprehensive than the first, and more fully embodies the plaintiff's views of his rights by virtue of said confirmation under the act of 1807.

a. Appellant maintains, first, that the facts in proof justified him in asking, and the court in granting, the instruction.

1st. There was proof tending to show that for ten consecutive years prior to the 20th December, 1803, Louis Lemonde had been in possession of the land of which the premises sued for were a part, for Madam Baccanné testified that Lemonde cultivated the land in the *life-time* of Auguste Condé, and he died, as was also proved, prior to the 13th January, 1778, and there was nothing to show that any person else either cultivated or possessed the tract after that date and before the said 20th of December.

2d. There was no proof that said land had ever been claimed by any other person than Lemonde after his cultivation of it had commenced, as proved by Mad. Bacanné.

3d. The proof showed that the tract in question did not exceed two thousand acres. In fact, it was a tract of one by forty arpens, being a common field lot in the St. Louis Grand Prairie. Of this there was, and could be, no question.

4th. On the 20th December, 1803, said Lemonde was a

resident of the Territory of Louisiana. This was shown by the testimony of Mrs. Bacanné.

5th. On that day, (the 20th December, 1803,) Lemonde still held the possession of the land. For, as already stated, Lemonde was proved to have cultivated the land in the lifetime of Condé, and that he was dead in 1778; and no other person was proved ever to have cultivated the land after Lemonde. In such case, the necessary legal inference is that Lemonde's possession subsisted until, and on, the 30th December, 1803.

6th. The claim to the land was presented to the board by Louis Lemonde in his own right as assignee of Condé. This is all shown by the record of the confirmation.

7th. It was shown that Condé was at that time dead, for, as already said, the proof was that he was dead on the 13th of January, 1778.

8th. The certificate of confirmation was delivered to said Lemonde. This fact was also established by the very record of confirmation.

b. The proof justifying the facts stated hypothetically in the instruction, the confirmation enured to Louis Lemonde. (See 1st section of the act of 3d March, 1807; Stat. at Large, vol. 2, p. 441; 2 Story's Laws, 1059.)

Yet the Land Court said, by denying the plaintiff's second instruction, that, under these circumstances, and in such a state of facts, the confirmation did not enure to Lemonde.

Still further, the meritorious ground upon which a title could be granted by the 2d section of the act of 3d March, 1807, was a possession for ten consecutive years prior to the 20th of December, 1803, and subsisting on that day, by a person then resident of the Territory. To a person having a possession of this character, and being then a resident of the Territory, no documentary or written evidences or muniments of title, no concession or deeds of any kind, were necessary.

The case of Strother v. Lucas, in 6 Peters, 770-1-2, and also again in 12 Pet. 458, is strongly in support of the position, indeed conclusive on the point, that the confirmation in

this case enures to Louis Lemonde. But I do not urge *my* interpretation of that case upon this court. It has been interpreted by the Supreme Court of the United States, the same court that decided the case of Strother v. Lucas. I rely, before this court, upon that interpretation.

In Bissell v. Penrose, 8 How. 338, the Supreme Court says, "that on each occasion when it (the case of Strother v. Lucas) was before the Supreme Court (6 Pet. 772; 12 Pet. 458) it was held that the confirmation was to be deemed to be in favor of the person claiming it."

It seems to me that this is conclusive in favor of Lemonde. He undoubtedly was the *person*, and the *only* person, *claiming* the confirmation.

Equally conclusive upon the point that Lemonde was the party entitled to the confirmation in this cause, is the case of Landes v. Brant, 10 How. 348. In that case, the court say, that when the commissioners decided in favor of a claim, the decision settles two points: "1. That the claimant is the proper person to receive the certificate."

This same point was before this court in the case of Boone *et al.* v. Moore, 14 Mo. 420, (his honor Judge Napton delivering the opinion of the court,) and there it was held that the confirmation enured to the person claiming the land before the board.

There has been a case before this court between these same parties, (Page v. Hogan, 22 Mo. 55,) in which this confirmation, made upon the claim of Lemonde, was under consideration. And upon the facts of the case, as then presented upon the record of that case, it was held that the confirmation did not enure to Lemonde, but to the legal representatives of Auguste Condé, the original concedee. But the record of that case did not present it to the court as the record in this case does.

In the first place, there was no such instruction asked by the plaintiff (Hogan) as the third instruction contained in the record in this case. In the next place, this third instruction presents a state of facts as bearing on the question of whether

the confirmation was in favor of Lemonde or Condé, that was not brought before this court when this confirmation was before it at a former day. In the third place, when the confirmation was before the court heretofore, it was not shown by the record that Auguste Condé was dead on the 13th January, 1778. So that, as the case then stood before the court, it was consistent with the facts in proof that Condé, the original concede of the land, may have possessed and cultivated it for ten consecutive years prior to the 20th December, 1803, and was at that date a resident of the Territory; and thus, that under the 2d section of the act of 1807 the confirmation was vested in him on the ground of his possession.

But, as this case now stands before the court, the record shows that Condé was dead on the 13th January, 1778, and consequently that—1st, he could not have been a resident of the Louisiana territory on the 20th December, 1803, as is required by said second section, in order that he should be confirmed in a tract of land; and that, 2d, he could not have cultivated the tract of land for ten consecutive years prior to the said 20th of December, as was also required by said second section.

This case, as it now stands on the record before the court, being different in many and material respects from that heretofore before this court between the same parties, it will receive full consideration on its merits as now presented by the record. (Strother v. Lucas, 12 Pet. 434.)

But the case of Bissell v. Penrose, I contend, clearly decides that the filing written evidence of title is *not* the thing that makes a person a claimant in the sense of the statute; but, that he in whose name the notice is filed with the recorder is claimant, for the Supreme Court of the United States say, in that case, "the son of Vasquez having parted with his interest, he had neither land nor claim, nor was he a claimant, as that term is regarded as applicable to those only in whose name the claim was filed with the recorder, under the act of 1805." Thus asserting "*in ipsissimis verbis*," that the term *claimant* is applicable to those *only* in *whose name*

the claim, or rather notice of claim, is filed with the recorder. And if this is so under the act of 1805, it must also, of necessity, be so under the act of 1807.

Now, I call particular attention to the *dates* in this case, and to the fact that Lemonde's claim was filed on the 23d of May, 1808, and that he claimed as assignee of Condé, who was shown to have been dead on the 13th January, 1778, so that he must have become such assignee prior to that day. By the Spanish law, as the same was in force in Missouri until 1816, a *verbal* sale of land was valid, although possession was not taken of the land by the vendee at the time of the sale."

This point has been so expressly decided by this court in the case of *Allen v. Moss*, 27 Mo. 354. This decision was made, to be sure, since the opinion under review was written; but the decision did not so make the law—it only declared it. The law was so before. And such, I believe, was the general sentiment of bar and bench. And this court, in the case of *Allen v. Moss*, refer to many cases decided in the State of Louisiana long before, so deciding the Spanish law to have been.

But Lemonde may have even had a deed of assignment, which he omitted to deliver to the recorder, to be recorded, and which he produced to the board; and they may have received it notwithstanding the omission. And this the board was fully competent to do; for, by the act of Congress, "their decision in favor of the claimant was final." They, therefore, were competent to say that they would not impose upon him the loss of his land as the penalty of omitting to record his instrument of assignment.

J. R. Shepley, for defendant in error. No brief on file.

BATES, Judge, delivered the opinion of the court.

This case was in this court once before, and the decision in it is reported in 22 Mo. 55. Having been remanded to the St. Louis Land Court, it was there tried again and judgment given for the defendant; and to reverse that judgment the plaintiff has brought the case again to this court by writ of

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error. At the trial below, the plaintiff gave in evidence the same confirmation to the representatives of Auguste Condé, which was considered by the court when the case was here before, and claimed as heretofore that that confirmation enured to Louis Lemonde, under whom he claims. He also gave some evidence of possession of the premises by Louis Lemonde prior to the 20th day of December, 1803, and claimed thereby a confirmation by virtue of the act of Congress of 13th June, 1812.

The Land Court instructed the jury that "upon the case as made by the plaintiff, he is not entitled to recover."

To entitle the plaintiff to recover, he must show title in himself; and until he has made a *prima facie* case, the defendant is not bound to show any color of right to the possession.

I. This court, when the case was here before, fully and clearly decided that the confirmation to Condé's representatives did not enure to Lemonde. The plaintiff claiming only under Lemonde, has therefore shown no title in himself under that confirmation.

II. The confirmation so given in evidence by the plaintiff to the representatives of Condé is a superior title to a confirmation to Lemonde by the act of 1812. The plaintiff has thus himself shown that he has no title by confirmation under the act of 1812.

Therefore the court properly instructed the jury that he was not entitled to recover.

Judgment affirmed. Judges Bay and Dryden concur.

HAMILTON BELL *et al.*, Appellants, v. WILLIAM DAWSON *et al.*,
Respondents.

Deed—Description—Uncertainty.—A deed dated March 6, 1775, from G. to O., described "a lot of one arpent in front by forty arpens in depth, situated in the Grand Prairie; bounded on one side by Mr. Laclede, and on the other side by the said vendor, such as it now exists, which the said O. has seen and is satisfied therewith." At the date of the deed G. owned a lot of three by forty arpens, which was bounded on both sides by Mr. Laclede. *Held*, that the deed was void for uncertainty of description.

Appeal from St. Louis Circuit Court.

This was an ejectment, commenced in the St. Louis Land Court, July 1, 1854, and taken by change of venue to the Circuit Court in 1856, and tried at the September term, 1859.

The land claimed was a tract of one by forty arpens, in the St. Louis Grand Prairie common fields, and alleged to be the southern arpent of the one and one-half arpens confirmed to Philibert Gagnon by the act of Congress of April 29, 1816, and surveyed as United States survey No. 1591.

To prove their title, the plaintiffs presented—

1. The report of Recorder Bates, confirming to Philibert Gagnon one and a half by forty arpens, under a concession recorded in 1 Livre Terrien, p. 22.

2. The concession dated February 7, 1769, for a tract of one and a half by forty, bounded on one side by land sold by Marie to Laclede, and on the other side by Leschappelles.

3. The United States survey No. 1591, for Philibert Gagnon, of one and a half by forty.

4. Archive 172. Conveyance from Philibert Gagnon to John B. Ortey, dated March 6, 1775, for "a lot of one arpent in front by forty arpens in depth, situated in the Grand Prairie, bounded on the one side by Mr. Laclede and on the other side by the said vendor, such as it now exists, which the said Ortey says he knows and is satisfied therewith."

To locate the land thus conveyed, plaintiff offered in evidence—

5. Archive 39, a conveyance dated July 1, 1768, from Alexis Marie to Pierre Laclede, bounded on one side by lot of Laclede, bought of Gabriel Dodier, on the other side by Philibert Gagnon, *dit* Sr. Laurent.

6. United States survey No. 3305, for Alexis Marie, for one by forty arpens.

7. Archive 36, dated July 1, 1768, from Gabriel Dodier to P. Laclede, for a lot — arpens in front by forty in depth, bounded on one side by Julien Roy, bought by Laclede, on the other side by Alexis Marie.

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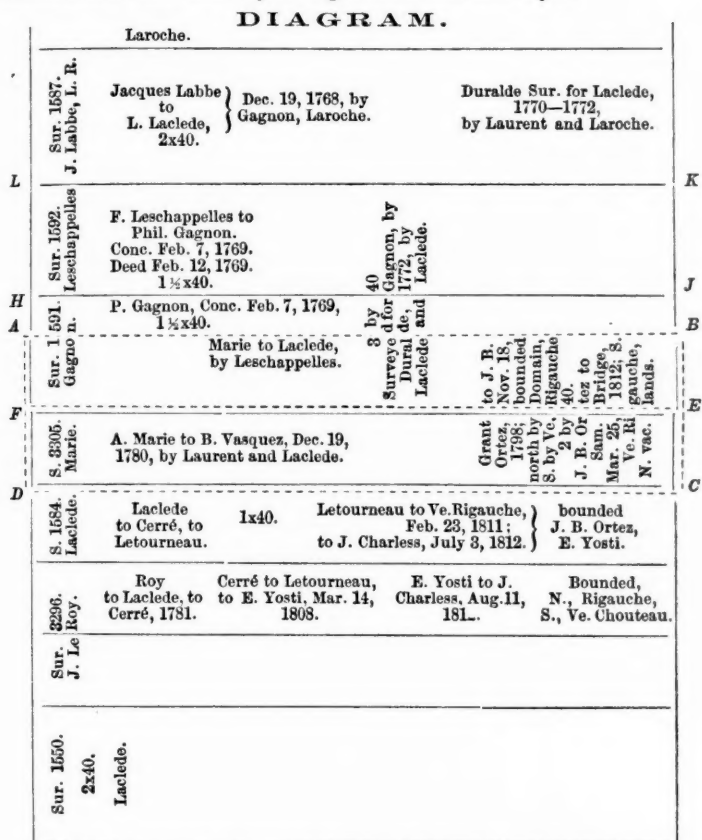
8. United States survey No. 1584, for Laclede's legal representatives, for one by forty arpens.

9. United States survey No. 1592, to François Leschappelles' legal representatives, for one and a half by forty arpens.

10. Confirmation by Recorder Hunt to Alexis Marie's legal representatives, for one by forty, bounded north by Laurent La Rouge, south by Laclede.

The plaintiffs claimed as heirs and representatives of John B. Orteze.

The following diagram will show the land sued for and its connection with the adjoining tracts and surveys :



A, B, E, F. Lands sued for and claimed by Pliffs. by deed from Gagnon.

A, B, C, D. 2x40, granted to Orteze, Nov. 18, 1798, (on his petition.)

L, K, E, F. 3x40, owned by Gagnon at date of his deed to J. B. Orteze, March 6, 1775.

By reference to the diagram and survey, the evidence of the plaintiffs apparently located the land described in the deed of Gagnon to Ortey as the southern arpent of the one and a half by forty, conceded to Gagnon February 7, 1769—A, B, E, F on the diagram.

DEFENCE. The defendants contended that the deed under which plaintiffs claimed was void for uncertainty of description; that if the land was located as claimed by the plaintiffs that their ancestors had sold it, and title by statute of limitations, by virtue of possession from the year 1834. The evidence upon the latter point will not be noticed.

The defendants offered—

1. The concession to François Leschappelles for one and a half by forty, dated February 7, 1769, for one and a half by forty, bounded on the one side by Philibert Gagnon, on the other side by Jacques Labbe, at present Mr. Laclede.

2. Archive dated February 12, 1769, from F. Leschappelles to Philibert Gagnon, for one and a half by forty, bounded on one side by Mr. Laclede, on the other side by the vendee.

3. A survey made by Duralde, the Spanish surveyor, between the years 1770 and 1772, for Laurent, of a tract of three by forty arpens, bounded on one side by a lot of Sen. Laclede, on the other side by another lot of Laclede.

4. A conveyance from Jacques Labbe to Laclede, dated December 10, 1768, bounded by Gagnon and Laroche, for a lot of two by forty arpens.

5. Duralde's survey for Laclede of two by forty arpens, bounded by Laurent and Laroche, made in the year 1770-1772.

6. The confirmations to Leschappelles, Labbe, and Laroche, by the United States, and surveys 1592, 1587, &c.

7. Deed from Alexis Marie to Benito Vasquez, dated December 19, 1780, for one by forty, bounded by Laurent and Laclede, deceased, with a derivative title to the defendants.

To prove the sale of the lot sued for by John B. Ortey, in his life-time, defendants offered—

8. A deed from John B. Ortey to Samuel Bridge, dated

March 25, 1812, for two by forty arpens, in the Grand Prairie, bounded on the south by Ve. Rigauche, and north by vacant lands.

To show the location of this tract defendants read—

9. Deed from Josephite Payentte Ve. Regauche to Joseph Charless, for two by forty arpens, bounded by J. B. Orteze and Emilien Yosti, dated July 3, 1812, bought of Louis Letourneau, by deed of February 23, 1811.

10. Deed from Emilien Yosti to Joseph Charless, dated August 11, 1812, for one by forty arpens, bounded north by Ve. Rigauche, south by Ve. Chouteau.

Defendants proved the possession of Charless under the deeds of these lots, part of which are included in the Fair Ground, the north line of the Fair Ground being the south line of the Marie tract, survey 3305.

Defendants shewed a derivative title from Philibert Gagnon, and possession under it since the year 1824.

Plaintiffs offered testimony tending to prove possession by Orteze prior to 1803.

For defendants the court gave the following instructions:

“The deed from Philibert Gagnon to J. B. Orteze, read in evidence by the plaintiff, and purporting to bear date March 6, 1775, purports to convey a tract of land in the Grand Prairie, of one arpent in front by forty in depth, and the said arpent is bounded on the one side by land of Laeclède, and on the other side by land of the vendor, the said Gagnon.

“If, therefore, the jury believe from the evidence, that at the time of the making of the said deed of Gagnon to Orteze, viz., March 6, 1775, that said Gagnon’s land was three arpens wide by forty deep, and that the same was bounded on both sides by lands of Laeclède, then the said deed of Gagnon to Orteze does not sufficiently locate and describe the land conveyed, and is void for uncertainty of description.

“If the tract of land of two arpens front by forty arpens deep, conceded to J. B. Orteze on the 18th November, 1798, by Lieut.-Governor Trudeau, and which was bounded on the south by land of Ve. Rigauche, includes the tract of one by

forty arpens for which suit is brought, then the said tract, and the lot sued for, were conveyed to Samuel Bridge by the deed of the said J. B. Orteze.

"In locating the tract of two and forty arpens sold by Orteze to Bridge, the jury will be guided by the calls of the deeds, and the actual location of the adjoining tracts made by the parties in possession, as shown by the deeds and testimony offered in evidence."

The plaintiffs asked, and the court refused, the following instructions :

"As to the deed from Philibert Gagnon to John B. Orteze, dated 6th March, 1775, the jury are instructed for the plaintiffs that, if they are satisfied from the evidence in the case, that the lot therein mentioned was situated in the southern part of the land or lot then owned by said Gagnon, and that the lot of Mr. Laeclède, called for in said deed as boundary on one side, was on the south side of said Gagnon's land, then owned by him, then the jury may find that said deed was valid to convey the lot therein described.

"The jury are instructed that the deed of John B. Orteze to Samuel Bridge, dated the 25th March, 1812, of a lot of two by forty arpens, conceded to him in 1798, does not convey, and does not on its face purport to convey, the lot of one by forty arpens acquired of Philibert Gagnon, as a part of a concession to said Gagnon in 1769 of a lot of one and a half by forty arpens, and which was confirmed and surveyed by the United States to Philibert Gagnon, *dit* Laurent, or his legal representatives, and the jury will disregard the said deed in this case."

The remaining instructions are omitted.

N. Holmes with *B. A. Hill*, for appellants.

I. The ambiguity does not arise upon the face of the deed ; it is a latent, not a patent ambiguity. (1 Greenl. Ev. § 297.)

II. Where the ambiguity arises upon the application of the deed to the subject matter of the grant, or upon the introduction of extrinsic evidence, parol evidence is always admis-

sible to explain and remove it; and it is a question to be determined by the jury.

Whatever ambiguity there was here arose only upon the presentation of extrinsic evidence on the part of the defendants.

1 Greenl. Ev. § 286 to 291, and notes; *Miller v. Travers*, 8 Bing. 244; *Atkinson v. Cummins*, 9 How. 479; *Hurley v. Morgan*, 1 Dev. & Bat. 425, 430-1, case of two "Rocky Branches"; *Barkley v. Barkley*, 3 McCord, 269; *Ott v. Soulard*, 9 Mo. 404, where the question was of two roads, the "public road" and the "royal road," the facts are to be found by the jury and the law by the court.

The ambiguity consisted in the question, which lot of Mr. Laclede? And the parol evidence only explained the true meaning of the words in the deed, without introducing any new words.

III. The practical construction of the parties—occupancy and use under the deed—possession—usage—ancient usage under ancient charters, or deeds—contemporaneous exposition—is the best rule and guide; and evidence that possession was presently taken by Ortey of the land or lot in controversy, under his deed, was admissible and competent to remove the ambiguity; and it was a question for the jury.

1 Greenl. Ev. § 300, *n.* (2), rule stated; 2 Co. Quid. 282, "has always been resorted to in explanation of the intent of the parties, and to give a construction to the location of the grant."

Livingston v. Ten Broeck, 16 J. R. 14, 23-4; *Owen v. Bartholomew*, 9 Pick. 520, 526; *Choate v. Burnham*, 7 Pick. 222, 230; *Cambridge v. Lexington*, 17 Pick. 274, 278; *Clark v. Mungan*, 22 Pick. 410; *Crafts v. Hibbard*, 4 Met. 452; *Adams v. Frothingham*, 3 Mass. 52; *Evans v. Greene*, 21 Mo. 170; 4 (Greenl.) Cruise's Dig., lib. 32, ch. 20, § 21 & *n.* (3); 4 Com. Dig. Foeff., b. 4, p. 176. "If foeffer says enter and enjoy according to the effect of this deed," it is a good livery of seisin; and so, if the foeffee enters in the life-time of the foeffer.

The clause, which is common to nearly all old French deeds, to the effect that the grantee takes the land (as in this case) "such as it now exists, which the said Orteze says he knows and is satisfied therewith," or (as in most instances) "which he says he has seen and visited (*"a vu et visitée"*), shows the existence of a usage here, in the French and Spanish times, closely resembling the ancient custom of livery of seisin under the English law: the parties went to the land and viewed it for the very purpose of seeing where and what the thing granted was.

Arthur v. Weston, 22 Mo. 380, Leonard, J.: "The highest degree of certainty was probably obtained by the ancient feoffment, where the parties and the land were all present, and the land conveyed was delivered by the grantor into the possession of the grantee."

Whittlesey, for respondents.

I. The court, as a matter of law, after the evidence was closed, could not tell the jury, nor lay down any rule for determining upon which portion of the three by forty of Gagnon the one by forty conveyed to Orteze was located.

a. What are the boundaries in a deed, is a matter of law; where these boundaries are, is a question of fact. The court must declare the former, the jury the latter. (*Doe v. Paine*, 4 Hawk. 64; *Cockrell v. McQuinn*, 4 Mon. 61; *Whittlesey v. Kellogg*, 28 Mo. 404, 407; *Ott v. Soulard*, 9 Mo. 581; *Evans v. Green*, 21 Mo. 210.)

It was the duty of the court to construe the deed.

b. The evidence did not enable the court to construe the deed. The call for Laclede might be answered either upon the north or the south, and the court could not say which.

The deed was ambiguous and the evidence did not explain the ambiguity.

Upon the point of ambiguity, patent and latent, see 1 Greenl. Ev., § 297-301, n. 1 & 2; 2 Phil. Ev. (C. & H. n. ed. 1859) pp. 749, 745, 780.

c. The deed remaining uncertain was void for that reason.

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The rule laid down by the Supreme Court of the United States in *Boardman v. Reed's lessee* is, "That if the land granted be so inadequately described as to render its identity wholly uncertain, it is admitted that the grant is void." (*Boardman v. Reed's lessee*, 328, 345; *Evans v. Ashley*, 8 Mo. 177, 184; *Jackson v. Roosevelt*, 13 J. R. 97; *Jackson v. Delaney*, 13 J. R. 557; *Jackson v. Ransom*, 18 J. R. 107; *Wright v. Pond*, 10 Conn. 255; *Huntt v. Gist*, 2 Har. & J. 498; *Worthington v. Hyles*, 4 Mass. 196; *Thomas v. Thomas*, 6 T. R. 671.)

BATES, Judge, delivered the opinion of the court.

This is an action of ejectment. The plaintiffs claim under a deed made on the 6th day of March, 1775, from Philibert Gagnon to John B. Orteze, for a piece of land described as "A lot of one arpent in front by forty arpens in depth, situated in the Grand Prairie bounded on one side by Mr. Laclede, and on the other side by the said vendor, such as it now exists, which the said Orteze says he knows and is satisfied therewith."

It was shown that, at the time this deed was made, Gagnon's land in the Grand Prairie, was a tract of three arpens in front by forty arpens in depth, and that it was bounded on both sides by lands of Mr. Laclede.

The court below, in effect, declared the deed void for uncertainty of description. This was right. The description was absolutely uncertain as to which side of the Gagnon tract it was intended to take Orteze's lot from, and there are no means of making the description certain.

Judgment affirmed; Judges Bay and Dryden concurring.

KENT & OBEAR, Appellants, v. THOMAS ALLEN, Respondent.

Deed.—By a marriage contract, dated July 6, 1842, between W. R., the father of A. R., and A. R. with T. A., it was agreed that all property that said W. R. might give or convey to said A. R. or T. A., or to their use, and the

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rents, issues and profits thereof, should be held and enjoyed in accordance with the terms of the conveyance or instrument of writing settling such property, except as in such contract afterward specially provided. It was further provided by the second article of said contract, that at any time during the marriage the parties to the contract might sell any of the property that might be conveyed by the said W. R. to the said T. A. or A. R., in accordance with the preceding stipulation, except where different provisions should be made by the deed of conveyance, in which case the provisions of the deed should control. The contract provided further, by article 4, that W. R. should purchase and settle upon his daughter A. R., to provide an annual income, productive real estate in the city of St. Louis, to be selected by him, in trust that the income should be paid to the said A. R., or her written order, during her natural life; and in case she should die leaving a child or children surviving her, then the payment to be made to such children until the youngest should attain the age of twenty-one years, at which time the fee should vest in such surviving child or children, &c. But if said A. R. should die without issue, then the absolute estate in said estate should revert to the said W. R. and his heirs. W. R. owning, at the time, a large amount of unproductive real estate, after the marriage, by deed of June 9, 1843, conveyed seven tracts of land in fulfilment of the purposes mentioned in the marriage contract to the said A. R., to hold to her sole use for life, and after her death to such of the children of said Ann as should attain twenty-one years of age, &c. But if the said A. R. died without issue, or issue attaining said age, then the title to revert to said W. R. or his heirs—the limitations prescribed by the deed following generally the stipulations of the contract for the purchase and settlement of income-producing property. Subsequently, W. R. purchased productive real estate, in compliance with the contract, and in satisfaction of the agreement to settle real estate producing income, and settled the same upon his daughter, and she, with her husband, acknowledged that the stipulations of the contract in that respect had been fully complied with. The plaintiffs, as agents for T. A., contracted for the sale of one of the pieces of land conveyed by W. R. to his daughter by their deed of June 9, 1843; and the said T. A. and wife, and the said W. R., joined in a conveyance to the purchaser, who refused to comply with his purchase, alleging that the deed tendered did not pass a good title in fee simple. Upon a suit by the plaintiffs against T. A., to recover the commissions due them for effecting a sale which fell through on account of a defect in the title, *held*, that by virtue of the marriage contract, and the deed of June 9, 1843, that the deed of W. R. and T. and A. A. to the purchaser, was a good and effective deed to pass the fee, and that the sale had not failed from any fault of the defendant.

Appeal from St. Louis Circuit Court.

R. M. Field, for appellants.

I. It is manifest that the court below, in finding that the land in question “was unproductive and could not be made

to produce enough to pay the taxes thereon," had reference to a renting by the year; for it is a sheer absurdity to say that forty acres of land lying in the heart of the city of St. Louis could not be made to produce an income above the public taxes by the grant of lease for a term of years.

II. The quality of the property as to productiveness is a test quite too vague and uncertain by which to determine the legal rights of the parties. These rights must depend on the plain, expressed limitations of estate contained in the conveyance.

III. The limitations in the deed of June 9, 1843, plainly conform to the fourth article of the marriage contract, and must be taken to be in pursuance of it. If any doubt could be suggested on this point, it will be removed by reading the deed of January 1, 1846. This last deed is manifestly a mere copy of the former, and is itself admitted to have been made in part satisfaction of that fourth article.

IV. The third deed read by the defendant is still more direct to the purpose. Adopting the limitations of the two former deeds, it contains a clause declaring that this "and the *deeds* before made" fully satisfy the agreement in the fourth and fifth articles of the marriage contract. Now the only deeds before made were that of January 1, 1846, and that of June 9, 1843, now in controversy. So that it is certain that the parties regarded the last mentioned deed as being made in pursuance of the fourth article of the marriage contract.

V. But, supposing that the deed of June 9, 1843, was not made in pursuance of the fourth article of the marriage contract, still Russell and Allen and wife had no power to dispose of the land, for the deed contains limitations of estates to children and grand children over which the settler had reserved no power. The power reserved by the second article extends only to such estates as might be given by the settler to "Thomas and Ann, or either of them." It seems that, by the second article, Russell was providing for the case where he should give lands to the husband or wife, and the grantee should die leaving infant heirs. In such case, the surviving parent and Russell,

had the power by the second article to sell the land; but this power has plainly no application to the estate of the children under the limitations of the deed now in question. Supposing further, that the second article of the marriage contract extended to the lands conveyed by the deed of June 9, 1843; still the power conferred by that article was merely equitable in respect to the estates of the children and grand children: After the exercise of the power, the legal estate would still remain in the children, bound indeed by the equity of the purchaser.

The latter would be compelled to resort to a court of chancery to obtain the legal title.

It will be observed that the power is over estates already vested under a deed of bargain and sale, so that it amounts to a power to declare a use upon a use subsisting. The second use is a mere trust in equity. (1 Sugd. on Powers, 1.)

S. T. Glover, for respondent.

I. The motion to review merely asserts that, on the facts as found, the plaintiffs were entitled to a judgment.

It is conceded, therefore, that the facts were correctly found, and consideration of the evidence would seem to be out of the case.

II. It is admitted that if the property in question was not conveyed to Mr. Allen for the purposes contemplated in the fourth and fifth articles of the marriage contract, that then the parties thereto, to-wit, Russell and Mr. and Mrs. Allen, might sell it.

After this admission, the case would seem to be relieved of of all difficulty. What were the purposes for which property was to be conveyed under the fourth and fifth articles? Why, Mr. Russell was to give her a support, and that support was to be guaranteed to her by the *future* purchase of property not then owned by Russell, which property was to be *improved* property, and was to be in value \$20,000; and until this was done, certain interest was to be paid to her.

Now, the property in question here cannot be the property

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contemplated by the fourth and fifth articles, for these reasons; because,

1. It was not purchased subsequently to the marriage articles.

2. It was owned by Mr. Russell at the date of, and prior to, the said articles.

3. The property in question was not improved property, as required by fourth and fifth articles. Whether it could be made productive is immaterial.

4. There are two conveyances in the record of property which Russell purchased afterwards, and which were of improved property, and which answered to the description of that required by articles fourth and fifth.

DRYDEN, Judge, delivered the opinion of the court.

Kent & Obear were real estate brokers in St. Louis, and were, in 1853, employed by Allen to sell for him, for not less than forty-one thousand dollars, a tract of forty-one acres of land in St. Louis county. They afterwards sold the land for the price limited to one Adolphus Meier. Afterwards, in due time, Allen, to consummate the sale, tendered to Meier a deed containing the usual covenants, duly executed and acknowledged by himself and wife, Ann R. Allen, and William Russell; but Meier refused to receive it, on the alleged ground that the grantors had no power to sell, and that the deed was ineffectual to pass to him the fee simple title, and thus ended the sale. Whereupon, Kent & Obear sued Allen for their services in the premises, charging that they did all they could to effect the sale, but failed in its accomplishment, and were prevented therein by reason only of the inability of Allen to make title.

The suit was brought and conducted to its termination under the practice act of 1849. The trial was had by the court without a jury. The following is the finding of the court, viz :

"The court finds the facts to be as follows: That the said Kent, in his life-time, and Obear were partners and real estate brokers in the city of St. Louis; as such, they undertook to

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sell the land in question for the defendant ; that there was no special agreement between the parties as to what should be paid the plaintiffs for their services ; that they negotiated a sale with Adolphus Meier for said land, the terms thereof to be one-half cash and the other half in three equal payments, at one, two and three years, respectively ; that the price to be paid by Meier was \$41,000.

“The commission usually charged by real estate brokers at that time, where no special agreement for their services was made, was two and a half per cent. on the price at which the land is sold ; but where the sale is not consummated, the broker receives nothing. If, however, the negotiations are made and the sale is not effected in consequence of a defective title, then the broker is entitled, by the usage, to the same commissions as if he had consummated the sale. The court further finds that in this case the defendant did, in due time after the negotiation aforesaid had been made by the plaintiffs for the defendant, tender to said Meier the following deed, offered in evidence ; but the said Meier refused to complete the purchase, on the ground that he had been advised by counsel that the said deed would not pass the title in fee simple to him.

“The said deed is as follows.” [Here follows a deed with covenants of warranty, &c., conveying to said Meier the said forty-one acres described in the petition. The deed was executed and duly acknowledged by Thomas Allen, Ann R. Allen his wife, and William Russell, and bears date September 1, 1853. The deed is not copied in the opinion because unnecessary to the decision of the case.]

“The following marriage contract and deed from Russell to Ann R. Allen, offered in evidence, are genuine, were duly executed by the parties thereto, as the same purport to have been, and were, duly recorded in the office of the recorder of St. Louis county.” [Here follows said marriage contract and said deed. The marriage contract bears date July 6, 1842, and was executed by Thomas Allen, the then intended husband, Ann Russell, and William Russell. The first, second and

fourth articles of said contract are all that are necessary for the determination of the question arising in the case, and are as follows:]

“ARTICLE FIRST—That all real estate, slaves, goods and chattels, and all property and effects whatsoever, by the said William Russell given, granted or conveyed, or which shall be given, granted or conveyed to the said Thomas and Ann, or either of them, or to their use, or the use of either of them as aforesaid, and the proceeds, rents, issues, and profits thereof, shall be held, used, enjoyed, and disposed of, according to the terms, clauses, stipulations, conditions, limitations, and reservations in the deeds, or writings, conveying the same respectively contained, touching the parties, or the tenure, use, and enjoyment of the said estate and property therein and thereby respectively conveyed, or conveyed, and not otherwise, except as hereinafterwards specially provided.

“ARTICLE SECOND—That the parties hereunto (all concurring) may, at any time during the continuance of said marriage, or in case of the death of said husband or wife, the other surviving, such survivor and the said William Russell may sell, dispose of, grant, and convey any of the estate, property, and effects above mentioned or referred to, all the parties thereto, or in case of the death of either said husband or wife, the survivor of them and said Wm. Russell, joining in in such sale, or other disposition, and in the deed or conveyance thereof, and not otherwise, except where provision for such sale or disposition of any property is made in the deed, or writing, by which the same was conveyed to the said parties of the first and second part, or either of them as aforesaid, in which case such sale and disposition may either be made according to the terms of such deed or writing, or as in this article above provided.

“ARTICLE FOURTH—That the said Wm. Russell intending to provide *further*, an annual income for said Ann, equal to the best lawful interest that can be had on \$20,000 in money; to accomplish which purpose the said William Russell shall, and will, from time to time, as soon as in his opinion it may

be advantageously done, make investments of money in the purchase of productive real estate, to be selected by him within the county of St. Louis, amounting in the whole to \$20,000; and upon such purchase being made, to make and execute such deeds, conveyances, assurances, and covenants as shall be good and sufficient in law to assure the fee simple estate in the property so purchased in trust or otherwise, and to secure the payment of the rents thereof, and the disposition of the estate in the manner following, that is to say: the payment of the rents, issues, and profits (after deducting taxes, and public charges, and necessary expenses of repairs,) semi-annually to said Ann, or to her written order, and to and for her sole and separate use during her natural life; and, in case said Ann shall die leaving a child or children surviving her, then such payment to be made to such child or children, until the youngest of them shall arrive at the age of twenty-one years; at which time, or sooner, if all the children of said Ann then living shall be of the age of twenty-one years or more, the fee simple in said estate shall be vested in such surviving child or children of said Ann, and the descendants of such (if any) as shall before them have departed this life, in the same manner as if the said Ann had died intestate seized in fee of said estate. In like manner, if said Ann shall depart this life leaving no child surviving her, but shall have a grand child or grand children so surviving her, then such payment to be made to such grand children of said Ann, until the youngest attain the age of twenty-one years, at which period, or sooner, after the death of said Ann, if all her grand children then living shall be of the age of twenty-one years or more, the estate shall be vested in them and their descendants as aforesaid. But if said Ann shall depart this life without leaving any children or grand children surviving her, as aforesaid, or those surviving her shall die before the happening of the contingency by which the fee simple would be vested in them according to the provisions of this article, then the absolute property in said estate shall revert to, and be vested in, said Wm. Russell and his heirs and assigns forever.'

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"William Russell, by said deed above mentioned, dated June 9, 1843, conveyed to his said daughter, Ann R. Allen, seven tracts of land, of which the tract of forty-one acres in controversy was one. This deed purported to have been made 'in consideration of the parental affection and regard of him the said William Russell, for his said daughter, and his desire to promote and provide for her means of honorable support, and also in fulfilment of the purposes contemplated by a certain agreement, dated July 6, 1842, signed by Thomas Allen, Ann R. Russell, (now Ann R. Allen,) and William Russell, &c., which said agreement is hereby referred to as part and parel of this deed,' &c. The habendum is as follows: 'To have and to hold the above described seven tracts, pieces or parcels of land, amounting in all to about the quantity of one thousand and eighty-five acres of land, be the same more or less, together with all the improvements thereon, &c., to and for the sole and separate use of the said Ann R. Allen during her natural life, and for the above and other good and valuable considerations and inducements, and in accordance with the agreement aforesaid. This deed further witnesseth that from and after the time of the decease of the said Ann R. Allen, all and singular the above described seven tracts, pieces or parcels of land, with all the rights, privileges, and appurtenances thereunto belonging, are hereby given, granted, bargained, sold, and conveyed, by the said William Russell, in absolute property in fee simple, to such child or children of said Ann R. Allen, if any, as may have survived her, and have attained, or afterwards attain, the age of twenty-one years, in equal shares to each, if more than one of such children, and to the descendants, if any, of such of them as shall have before then departed this life, the same share which such deceased child of the said Ann (if alive) would have held in the land aforesaid under this claim, to have and to hold the the said seven tracts, pieces and parcels of land, with all the rights, privileges, and appurtenances thereunto belonging, from and after the decease of said Ann, to such child or children (if any) of her the said Ann R. Allen, and to the descen-

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dants of such of them as may have before them departed this life as above provided, and to their heirs and assigns forever. No one of such children, or their descendants, shall claim, hold, or control the fee simple estate in the lands above conveyed until such child, or the descendants of such deceased child of the said Ann, shall have arrived at twenty-one years of age; but the share of such, with the incomes and profits thereof, shall be held and managed for the use of such minor by a trustee, to be appointed by the proper court having jurisdiction of such matters, until he or she, so being a minor, arrives at twenty-one years of age, when the fee simple of his or her share in said lands shall become absolutely vested in such child or children, or their descendants, of her the said Ann R. Allen. But if there be no child or children, or descendants of a child or children, of her the said Ann R. Allen surviving her, and who have attained or live to attain to the age of twenty-one years, in that case the title to all the aforesaid seven tracts, pieces or parcels of land, with all the rights, privileges and appurtenances thereunto belonging, shall revert to and become absolutely vested in fee simple in him the said William Russell, and his heirs and assigns forever.'

"It was admitted by the parties on the trial that, prior to, and at the date of, the marriage contract, and of the deed from Russell to Ann as aforesaid, the title in William Russell to the land in question was an indefeasible estate in fee simple.

"The court further finds that on the 9th day of June, 1843, all the property mentioned in the said deed of that date was unproductive, and did not and could not be made to produce enough to pay the taxes thereon; and the tract mentioned in the petition has continued ever since to be so unproductive.

"That, on the 27th of April, 1844, the said William Russell purchased of P. D. Tiffany, a lot of ground on Main street, in the city of St. Louis, which the said Tiffany and wife conveyed to said Russell in fee simple, by deed of April, 27, 1844; which said lot so purchased of said Tiffany the said Russell afterwards conveyed to said Ann R. Allen, by

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deed of date January 1, 1846, which was duly acknowledged and recorded, and is in the words following." [Here follows the deed conveying the lot, with two storehouses thereon, to said Ann R. for life, as in case of the deed of June 9th, 1843, and on and for the same considerations expressed in that. Habendum precisely the same as in deed of June 9, 1843.]

"The said Russell also purchased of John Bell, John R. Shepley, and Mathew Kerr, a lot of land on the corner of Market and Fifth streets, St. Louis, which they conveyed to him in fee simple, by deed dated April 27, 1844, which lot the said Russell afterwards, by deed of date June 4, 1849, conveyed to said Ann R. Allen, which deed is as follows." [Here follows a deed for the lot on Market and Fifth streets to Thomas and Ann R. Allen, and to the survivor of them, for life, reciting same consideration as in former deeds, making the marriage contract part and parcel of it; same habendum as in deeds of June 9, 1843, and January 1, 1846. In this deed are the following recitals and averments, viz: "And, whereas, by the fourth and fifth articles of the agreement aforesaid (marriage contract) the said William Russell made certain promises and agreements to provide an annual income for the said Ann, equal to interest on \$20,000 in money, and setting forth the manner in which such income might be secured and perpetuated by purchase of productive real estate in the county of St. Louis, amounting in the whole to the sum of \$20,000, and to secure the payment of the rents and profits thereof to the said Ann; and that until such real estate shall be purchased and secured to said Ann for said purposes, the said William Russell shall pay interest on such part of said \$20,000 as shall not be so invested, at the rate of ten per cent. per annum, payable semi-annually, &c. Now the said Ann R. Allen and Thomas Allen, Esq., her husband, hereby acknowledge and declare that the execution of this deed by the said William Russell, and the deeds heretofore made and delivered by him to the said Ann R. Allen, especially a deed dated January 1, 1846, and also by the said William Russell having paid the interest which he promised by said agreement

to pay to the said Ann up to the times of executing said deeds, fully and entirely satisfies and discharges all the promises and obligations of him the said William Russell, expressed or implied, contained in the fourth and fifth articles of the agreement above referred to ; and the said William Russell is hereby fully released therefrom, as having entirely fulfilled and performed all the obligations therein contained.”]

“The court further finds that the failure of the plaintiffs to complete the sale with Meier was not caused by any failure or neglect on the part of the defendant to comply with the terms of the sale on his part, he having tendered the aforesaid deed to Meier ; nor did he when he employed the plaintiffs to negotiate a sale of said land make any representations to the plaintiffs as to the fee simple owner of said land, or in whom the fee was, or what was the real title thereto.

“Conclusions of law on the above facts: 1. That the said deed, from William Russell, of June 9, 1843, was not in satisfaction, or part satisfaction, of the fourth article of the said marriage contract.

“2. That the said deed tendered by the defendant to Meier was effectual to convey a good title to the land therein described.

“3. That on the facts aforesaid, the plaintiffs are not entitled to recover, and judgment ought to be rendered for the defendant.”

The finding and judgment being against the plaintiffs, they moved the court to review its decision ; but the motion was overruled, and they excepted and appealed.

The complaints urged by appellants in this court against the judgment of the Common Pleas is based upon the supposed insufficiency of the deed tendered to Meier to vest in him the fee simple title to the land in controversy. Upon the correctness or incorrectness of this assumption the case must turn. The court understands it to be conceded by the parties that if the deed was sufficient to pass the title it purported to convey, plaintiffs (appellants) are not entitled to recover ; because, without the fault of Allen, they have failed

to complete the work they engaged to perform, and upon the performance of which their compensation depended. On the other hand, if the deed was insufficient for this purpose, inasmuch as the plaintiffs did all they could in the performance of their undertaking, and were prevented from accomplishing it only by the fault of Allen, they ought to recover the value of their services.

Again: the sufficiency or insufficiency of the deed tendered depends upon whether the deed of 9th June, 1843, was made by Russell and accepted by Mrs. Allen with reference to the provisions of the first and second articles, or in satisfaction in whole or in part of the stipulations of the fourth article of the marriage contract. If, with reference to the first and second articles, then the deed tendered was sufficient to pass the title it purported to convey, but otherwise if under the fourth article.

Upon examination of the evidence on the point presented in the bill of exceptions, the court is disturbed by no doubt upon the question.

1. The obligation of the fourth article was to be discharged by the conveyance of *productive* property, and none other, thereafter to be purchased by Russell. The provisions of articles first and second would be satisfied by the conveyance as well of *unproductive* as productive property, as well of property *then* owned by Russell as of that he might thereafter acquire. The property in dispute was wholly unproductive, not after acquired, but owned by Russell at the time, and therefore in character fails to meet the requirements of the fourth article.

2. So, when we look to the end to be accomplished by the fourth article—"to provide an annual income for said Ann"—we find the conveyance, or the property conveyed, falling equally short of the mark. On the contrary, articles first and second had no sort of relation to "an annual income," or to the support of Mrs. Allen; and the calls of these articles is well met by the conveyance under consideration.

3. Again: the inference drawn from the resemblance of



the trusts and limitations in the deed to those required by the fourth article—that this conveyance to Mrs. Allen was made by Russell in satisfaction of said article—is met by the consideration that if the deed was in fact intended as a compliance with articles first and second, power is thereby expressly given to sell and convey the property in fee or otherwise, no matter what the trusts or limitations imposed upon it by the deed.

The deed expressly adopts the marriage contract, and makes it part thereof, in all the provisions applicable to the deed as completely as if written out at length. Since, then, there is nothing in the case inconsistent, but every thing consistent with the hypothesis that the conveyance to Mrs. Allen of 9th June was intended to have operation under the first and second articles, and not under the fourth, it is the opinion of the court that the deed tendered to Meier, made under the powers reserved in said first and second articles, was sufficient in law to pass the title to the land in controversy in fee simple.

The other judges concurring, the judgment of the Common Pleas is therefore affirmed.



MARY ANN PENDLETON *et al.*, Respondents, v. WILLIAM H. BELL, Appellant.

Conveyance—Marriage Settlement—Power.—In view of marriage, property was conveyed by settlement and contract by the intended wife, to trustees, to hold, until marriage to the use of the grantor and her heirs, and from the marriage to the sole and separate use, benefit and disposal of the wife for and during her natural life, free of her husband's control, &c., and to such uses as the said wife might by writing, &c., direct and appoint; and on her death to such uses as she by will might appoint and direct; and if she died intestate, to the use of the issue of the marriage then living; and in default of such issue, to the use of the heirs of said wife. The deed further provided that all the property might from time to time be successively charged, invested and reinvested indefinitely by the trustees on the request in writing, &c., of the wife. *Held*, that the wife, with the trustees, could, by proper conveyances, pass the fee of the lands settled by the deed, and that she was not confined to the disposal of her life estate only.

Appeal from St. Louis Land Court.

The terms of the deed are set out in the opinion of the court.

B. A. Hill, A. Burwell, and C. D. Colman, for appellant.

The questions presented in the case were argued at length, in a written argument by B. A. Hill, Esq., counsel for appellant, and other parties interested in the question. As the court does not put its decision upon any technical grounds depending upon the use of mere terms, but bases its opinion upon the general intent of the deed, we give only the points presented by Mr. Hill, with reference to the authorities cited.

I. By the marriage settlement, the real estate was granted to trustees, and after the marriage the *cestui qui trust*, Mrs. Pendleton, was seized of an estate tail by virtue of the limitations thereon, which, by the operation of R. C. 1845, c. 32, became an estate for life, with remainder to issue of marriage, who became on their births respectively entitled to a vested estate in fee simple, and will take as purchasers on her decease, if their title be not divested by will. (R. C. 1845, c. 32, § 5, p. 219.)

By section 9 of the same statute, a freehold estate of inheritance may be made to commence *in futuro* by deed, in like manner as by will.

Mrs. Pendleton, then, merely took an estate for life, (with a fee simple expectant,) even if that statute be left out of consideration, and she has no power of appointment beyond her life estate. *Godolphin v. Godolphin*, 1 Ves. 521, *Liefe v. Saltingstone*, cited *Sand. on U. & T.*, 2 Am. ed., p. 123, states a case similar to this. It is presumed the children take as tenants in common by force of the statute.

It is observable that the power of appointment by writing, &c., is not made to take effect after the determination of the life estate, &c., nor is the life estate made determinable on the appointment, but it seems to be a part of the clause reserving the estate to her separately for life, and therefore extending to her life estate only.

Again : the next remainder is, and in the event of her dying intestate, the whole property is absolutely and positively to go to the issue, not "subject to any appointment already made," nor "so far as such appointment shall not extend," but absolutely to go to the issue of the marriage, and in default, to the right heirs of Mrs. Pendleton. There is, therefore, no way by which a good title can be made to a purchaser, except by a deed executed by Mrs. Pendleton and the issue of the marriage after they come of lawful age, or otherwise after the death of all the children and her husband.

Mrs. Pendleton has only an estate for life. (Bradley v. Wescott, 13 Ves. 445 ; Lockett v. Wray, 4 Bro. C. C. 486, *n.* 71 & 59 ; Crabb on Real Prop., § 983, with power of disposal of the inheritance *sub modo*—that is, by last will, &c. ; Grigsby v. Cox, 1 Ves., 517 ; Sto. Eq., J., p. 828, *n.* 2, 4 ed. ; Reid v. Shergold, 10 Ves. 370 ; Anderson v. Dawson, 15 Ves. 532 ; Tomlinson v. Dighton, 1 P. Wms. 149 ; Nannoch v. Horton, 7 Ves. 392 ; Daniel v. Upton, Noys, R. 80 ; 1 P. Wms. 159 ; 1 Sir Wm. Jones, 137.)

Even if it be contended that immediately after the marriage Mr. and Mrs. P. may have avoided the contingent remainder by a conveyance before the birth of issue, it cannot be contended that it could be done after the contingency had happened, and the issue were born, being in vested estates as purchasers *per formam doni*, as well as by the statute of 1845. In this case, the settlement was for the benefit of the issue of the marriage as well as for the husband and wife. (4 Kent, 535 ; Jackson v. Coleman, 2 J. R. 391 ; Herrick v. Babcock, 14 J. R. 389 ; case of Flintham, 11 S. & R. 16.) The consideration runs through the whole settlement, and when the provision is once made no event can afterward alter it. The consideration of the marriage protects it. (Nairn v. Prouse, 6 Ves. Jr. 759 ; Neusted v. Searles, 2 Vern. 281 ; Brown v. Jones, 1 Atk. 188 ; Gorin v. Nash, 3 Atk. 189, and cases there cited ; Johnson v. Legard, 6 M. & S. 60, and cases cited ; Magneac v. Thompson, 7 Pet. 349 ; Bradish v. Gibbs, 3 J. C. R. 523 ; Verplanck v. Sterry, 12 J. R. 536 ; S. C., 1 J. C. R. 261 ;

Whelan v. Whelan, 3 Cow. 579; Turner v. Tregevant, 2 Dessaus. 264; Gasset v. Grout, 4 Mete. 486; Betts v. Wn. Bnk. of Maryland, 1 Har. & G. 175; Sterry v. Arden, 1 J. C. R. 261; Osgood v. Strode, 2 P. Wms. 245; Taylor v. Heriot, 4 Dessaus. 327; Bank v. Brown, Riley, Ch. 131; Duffy v. Ins. Co., 8 Watts & S. 413; Harrison v. Carroll, 11 Leigh, 476.)

II. The power to charge and reinvest contained in the deed does not give the power to dispose of the fee as claimed by the plaintiffs.

The rule is well settled "that a general power may be restrained to a particular purpose where the intention of the parties requires such a construction. (Ld. Hinchinbrock v. Seymour, 1 Bro. C. C. 395; Earl of Tankerville v. Coke, Mos. 146; 1 Sugd. Pow., 455, 527, 529.)

This is not a power in gross; it is collateral. If it be an indefinite power, it would be void. It was designed to increase that trust estate, not to diminish it. (Sugd. Pow., 54, § 4, & p. 533, § 1-6.)

The power to charge indefinitely would be void as against the marriage consideration, and the issue who take as purchasers. (Mildmay's case, 1 Coke, 176, 6; Roe v. Dent, 2 Wilson, 336.)*

A. Burwell, for appellant, presented a written argument.

T. T. Gantt, for respondent.

It appears that the only question for the Supreme Court is, whether by the terms of the deed of February 7, 1853, Mrs. Pendleton and her trustees can, by any form of conveyance, make a title in fee to the purchaser of any part of this land?

* It is questionable whether the English cases upon this subject are applicable to conveyances under our statute, (R. C. 1845, p. 219,) as by section 2, it would appear that the presumption of law is that the fee is conveyed, and that without the use of the word "heirs," unless the contrary intention appear by express terms or necessary implication; while, by the English law, the presumption is that the estate is limited, unless the intent to pass the fee be expressed.—*REP.*

It must be borne in mind that up to the execution of this deed, Mrs. Coxe (now Mrs. Pendleton) was seized in fee of the land in controversy ; and that the object of the deed of settlement was to secure to her sole and separate use the enjoyment and power of disposal of this land, and to exclude her intended husband from all marital rights over it. This intention is apparent. It only remains to be seen whether there are apt words to effectuate it.

The legal title is vested in the trustees and their heirs "to the uses, on the trusts, for the intents and purposes, and by, with, under and subject to the powers, provisos and agreements hereinafter limited, expressed and declared, of and concerning the same; that is to say, to the use of the said party of the second part (Mrs. Coxe, now Mrs. Pendleton), her heirs and assigns, until the said intended marriage shall be had and solemnized; and from and immediately after the solemnization thereof, to the sole and separate use, benefit and disposal of the said party of the second part, for and during her natural life, free from any control by, or liableness for, or on account of, her said intended husband, and to such uses as the said party of the second part may at any time or times thereafter, by any writing, signed with her hand, in the presence of two or more credible witnesses, direct and appoint; and on her death, to such uses as she may, by her last will and testament, duly made and executed, direct and appoint; and in the event of her dying intestate, to the use of the issue then living of the said hereby intended marriage; and in default of such issue, then to the use of the right heirs of the said party of the second part." * * * "And this indenture, and the estate created by the same, is hereby made subject to this other and further condition and trust, namely, that all or any of the property and effects whatsoever, constituting or to constitute the said trust estate, shall and may be, from time to time, and successively charged, invested and reinvested indefinitely by the said trustees, on the sole and separate request made in writing, (attested by two or more credible witnesses,) of the said party of the second part, and that each and every thus

newly acquired accession to the aforesaid trust estate shall be subject to the uses hereinbefore limited and declared."

The defendant in error submits the following propositions, viz :

1. That the first use limited upon the estate in the hands of the trustees, after the solemnization of the marriage, is for "the sole and separate use, benefit and disposal of the party of the second part (Mrs. Pendleton) during her natural life, free from all control or liability for or on account of her said intended husband."

2. That there is a power of disposal in fee annexed to this estate for life, as indicated by the words which follow : "and to such uses as the said party of the second part may at any time or times hereafter, by any writing, signed with her hand, in the presence of two or more credible witnesses, direct and appoint."

3. That the general power "from time to time to charge, invest and reinvest indefinitely all or any of the property and effects constituting or to constitute the said trust estate," is, without more, amply sufficient to authorize the sale of any of it in fee.

The language quoted from the deed in the third proposition submitted by defendant in error, by which the trustees are authorized "on the sole and separate request, &c., of Mrs. Pendleton, to charge, invest, and reinvest indefinitely," all or any part of the trust estate, seems to have been chosen on purpose to signify the intention of Mrs. Pendleton to reserve the fullest power of altering the form of the trust property, or disposing of it during her life-time.

She has an "indefinite," that is to say, an *unlimited* power to charge the trust estate or any part thereof. Of course, this admits of her charging it to its full value ; which, to any common apprehension, is equivalent to selling it in fee ; that is, disposing of the highest estate in it which the law recognizes, and realizing the highest value therefor. This, it is submitted, there would be no difficulty in understanding if the matter were *res nova*. But the case has frequently arisen before,

and has been uniformly decided as now contended by defendant in error.

An indefinite power to charge is a power to sell in fee. (Long v. Long, 5 Ves., p. 445; 1 Sugd. on Powers, 508 and following; 2 Vernon 153, Wareham v. Brown.)

It is believed unnecessary to accumulate authorities on so plain a point. But it is decisive of the controversy.

Again: the power to "invest and reinvest indefinitely the whole or any part of the trust estate," can only mean the power to change the form of the investment at the pleasure of Mrs. Pendleton. She may at her discretion direct all the real estate to be converted into money, or all the money to be converted into real estate. It would be a waste of time to argue or cite authorities to prove that power to do these things presupposes power to sell the real estate outright, that is, in fee.

BATES, Judge, delivered the opinion of the court.

The only question to be considered in this case is as to the power of Mrs. Pendleton and her trustees to convey in fee portions of the real estate held by the trustees of her marriage settlement. The deed of marriage settlement, executed in the city of Washington, on February 7, 1853, is, in all its parts, material to be here set forth, as follows:

"This indenture, made this 7th February, in the year 1853, between William A. Pendleton, of the county of Caroline, Virginia, of the first part, Mary Ann Coxe, of the city of St. Louis, Missouri, of the second part, and Richard Bland Lee, &c., and Thomas T. Gantt, of, &c., of the third part. Whereas, a marriage is agreed on and intended to be solemnized between the party of the first part and the said party of the second part, and on the treaty of said marriage it was agreed by and between them that all the property of any kind whatsoever, &c., of the said party of the second part, which she has, or which may at any time hereafter, before or during her coverture, fall to her by gift, devise, inheritance, in course of distribution or otherwise howsoever in her own right, should

be conveyed, assigned, settled, and allowed to her sole and separate use during her coverture, free from any control by, or liableness for or on account of her said intended husband, and subject to be disposed of by her appointment or direction as hereinafter provided; and whereas, also, the said party of the second part is seized and possessed of certain lands, tenements and hereditaments, situate, lying and being in the State of Missouri and elsewhere, among which are the following lots of ground in the aforesaid city of St. Louis, that is to say: (here follows a description of real estate.) Now, this indenture witnesses, that, in pursuance and in part performance of the said agreement made as aforesaid on the aforesaid treaty of marriage, and in consideration, &c., the said party of the second part, by and with the consent, &c., has granted, bargained and sold, aliened, released, assigned, transferred, conveyed and confirmed, and hereby does grant, &c., &c., to the said parties of the third part and the survivor of them, and the heirs, &c., of such survivor, all and singular the hereinbefore mentioned lands, tenements and hereditaments, estate and rights of the said party of the second part, &c., &c., to have and to hold with all, &c., &c., to the said parties of the third part, &c., &c. But nevertheless to the uses, on the trusts, for the intents and purposes, and by, with, under and subject to the powers, provisos, declarations and agreements hereinafter limited, expressed and declared of and concerning the same; that is to say, to the use of the said party of the second part, her heirs and assigns, until the said intended marriage shall be had and solemnized, and, from and immediately after the solemnization thereof, to the sole and separate use, benefit and disposal of the said party of the second part for and during her natural life, free from any control by or liableness for or on account of her said intended husband, and to such uses as the said party of the second part may at any time or times hereafter, by any writing, signed with her hand, in the presence of two or more credible witnesses, direct and appoint; and on her death, to such uses as she may by her last will and testament, duly made and executed,

direct and appoint; and in the event of her dying intestate, to the use of the issue then living of the said hereby intended marriage; and in default of such issue, then to the use of the right heirs of the said party of the second part." * * *

"(B.) And this indenture, and the estate created by the same, is hereby made subject to this other and further condition and trust, namely, that all or any of the property and effects whatsoever constituting or to constitute the said trust estate, shall and may be from time to time successively charged, invested and reinvested indefinitely by the said trustees, on the sole and separate request made in writing, attested by two or more credible witnesses of the said party of the second part, and that each and every thus newly acquired accession to the aforesaid trust estate shall be subject to the uses hereinbefore limited and delared." * * * "In testimony whereof," &c.

In considering this question, it is proper to inquire—Firstly, what is the general object and intent of the whole instrument? The preamble evidently contemplated that the (then) future wife should, by means of her trustees, have as absolute dominion, in effect, over her estate as if she should remain unmarried, as well to dispose of it as to use it. The statement that the disposal of the property is to be "as hereinafter provided," is not a limitation upon the power of disposal, but only a reference to the following parts of the deeds for directions as to the manner of disposing of the trust property. The deed, then, vests the legal title in the trustees to the use, first, of Mrs. Coxe (now Mrs. Pendleton) until the marriage be solemnized, and after that, second, to her sole and separate use, benefit and disposal for her life, and to such uses as she may at any time or times direct and appoint, and, on her death, to such uses as she may by last will direct and appoint, and if she die intestate, to the use of the issue of the intended marriage, and, in default of such issue, to the use of her right heirs.

The trustees were also authorized, upon her request, to charge, invest and reinvest indefinitely the trust property. The execution of this last power might result in the aliena-

tion in fee of the whole or parts of the trust property. The whole deed shows an intention to place the property in such condition that it could be disposed of at the pleasure of Mrs. Pendleton. It is contended, however, that apt words to express that intention are not used in the instrument, but, on the contrary, such words are used as vest in Mrs. Pendleton only a life estate in the use, with the power of appointment for her life estate only.

The property is held in trust for her sole and separate use, benefit and disposal during her natural life. Were this clause the only one which specifically gave to the wife a power to dispose of the property, it might well be questioned whether it extended beyond her life; but that it does authorize her to dispose of the estate for her life cannot be doubted. The next clause of the deed declares that the property shall be held to such uses as she may at any time or times direct and appoint. These words are sufficiently broad to comprehend the largest estate in the property, and if they be restricted to apply only to her life estate, they really mean nothing, as the power to dispose of that is already granted. They do mean something, and that meaning must be what they plainly express, that Mrs. Pendleton may appoint the whole use—that is, absolutely and forever, or in fee. The next clause of the deed, by the use of similar language, gives her power to appoint uses by her last will, and no one questions or can doubt but that this extends to the fee. It is thus perfectly evident that she was not to be wholly restrained from appointing a use in fee, and no causes appear why she may not do it during her life, as well as by will, to take effect after her death.

Did any doubt remain as to the general intent of the deed of settlement, it would be solved by reference to the very comprehensive terms in which the husband covenants to permit and suffer the wife “to use, enjoy, possess, control, give, grant and dispose of her said separate estate as she shall think fit in her life-time, and that it shall be lawful for her, during her coverture, by her last will and testament, to devise, bequeath

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and dispose of the whole or any part of the property, estate, interest and rights hereby conveyed, of every kind whatsoever, wherever situate, and whether in possession or possibility, and that such last will and testament shall be good and available in law, the consent of the said party of the first part thereto being hereby declared."

Mrs. Pendleton and her trustees can, by proper instruments, convey in fee, and, as that is the only question submitted to the court, no opinion is given as to the character and form of the instruments necessary to effect that purpose.

Judgment affirmed. Judges Bay and Dryden concur.

ADOLPHE PAUL *et al.*, Respondents, v. WILLIAM FULTON AND
M. BROTHERTON, Appellants.

Trust.—R. P. and his children being jointly interested in land with G. P. and his children, the land was sold in partition and purchased by R. P. for the joint benefit of himself and G. P., no money being paid except the costs, of which each paid one half. R. P. gave G. P. a written acknowledgment, as follows: "I do hereby declare that the purchases which I made, &c., were made for the joint account of G. P. and myself on a verbal agreement between him and me—the deeds of sale are to be made by the commissioner to me. If G. P. wishes to have one half of each tract, I shall execute deeds to him to that purpose; otherwise and until then, whenever I shall sell any part of either, I shall account to him for the one half of the nett proceeds." *Held*, that the trust was a trust for the purpose of converting the land into money, and might as well be executed by the executor of R. P. after the death of G. P. and R. P. as by R. P. himself, no request for a conveyance prior to the sale being shown.

Appeal from St. Louis Land Court.

This case was before the court as reported in 25 Mo. 156. After the case was remanded the plaintiffs amended their petition, setting forth the transaction between Gabriel Paul and René Paul, and setting up the written declaration of trust on the part of René in favor of Gabriel Paul, and alleging that Fulton was a purchaser with notice, and pray-

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ing a decree for one half of the land. On the trial it appeared that the late Gabriel Paul and René Paul, with their children respectively, were tenants in common of a tract of land on Creve Cœur lake, containing 800 arpens. In 1838, proceedings were had in St. Louis Circuit Court for the partition of this land among the parties in interest. A judicial sale in partition was had, and René Paul became the purchaser, and the land was conveyed to him by the commissioners. At the time of the sale in partition, there was a private agreement between the brothers Gabriel and René, that René should purchase the land, and hold it, under the obligation to convey one half to Gabriel if requested; and if he should sell the same, to account to Gabriel for one half the proceeds. This agreement was reduced to writing, but never recorded. In 1846 Gabriel Paul died, leaving for heirs his children, the plaintiffs in the present suit. In 1851 René Paul died, leaving a will, in which he empowered and directed his executors to sell his lands. Marshall Brotherton, the executor of René Paul, in 1852 advertised and sold the land in question to the defendant Fulton and Mrs. Gosnell, one of the children of René Paul. One half the purchase money was paid down—Mrs. Gosnell, however, giving a receipt to the executor for the amount due by her as a part of her distributive share of the estate. The other half of the purchase money was secured by a note payable in two years. In 1853, Mrs. Gosnell sold and conveyed to Fulton her half of the land, subject to the deferred payment. The second payment under the sale by Brotherton had not been made when this suit was commenced on the 23d day of July, 1855. Pending the suit, this second payment was fully made by Fulton to Brotherton.

The original petition of the plaintiffs stated that they were owners in equity of one half of the land; that Fulton made his purchase with notice of the plaintiffs' equitable rights, and it asked for a conveyance of one half of the land, or, in the alternative, if no notice appeared, then that they should have a decree for one half the purchase money.

The agreement signed by René Paul was as follows :

“ I do hereby declare that the purchase which I made of two tracts of land, each of 800 arpens, the one at Creve Cœur, the other on the road from St. Louis to St. Ferdinand, were made for the joint account of Gabriel Paul and myself on a verbal agreement between him and me—the deeds of sale are to be made by the commissioners to me. If Gabriel Paul wishes to have one half of each tract, I shall execute deeds to him to that purpose ; otherwise and until then, whenever I shall sell any part of either, I shall account to him for the one half of the nett proceeds.

August 21st, 1838.

R. PAUL.”

The evidence was the same as at the former hearing.

Finding of Facts by the Court.

“ In June, 1837, René Paul and his children were the owners of a moiety of the land described in the petition, and Gabriel Paul and his children were the owners of the other moiety of said land ; that, under proceedings had in partition, the said land was sold by commissioners on the 20th day of August, 1838 ; and at such sale René Paul became the purchaser thereof, and received a deed from the commissioners therefor. That said René Paul paid no money upon the receipt of said deed, except the costs of the proceedings in partition, one half of which costs were afterwards paid by said Gabriel Paul to said René. That said René Paul held the land so purchased upon the trust to convey the half thereof to Gabriel Paul upon request ; or, if no request was made for a conveyance, to sell the same, and to account to said Gabriel for one half of the proceeds of sale. That no request was made by Gabriel Paul for conveyance in his life-time, nor by his heirs after his death, until after the sale of said land to said Fulton and the trustee of Mrs. Louise Gosnell. That during this time, and up to August, 1843, here were transactions between the brothers Gabriel Paul and René Paul in regard to the purchase and sale of land on their joint account. That in September, 1842, each of

the brothers claimed a balance as due to him from the other. That in August, 1843, René Paul, by letter addressed to Gabriel Paul, requested him to come to an account touching the various land transactions between them. That Gabriel Paul died in August, 1846, leaving heirs Adolphe, Estelle, wife of R. W. Ulrici, and Therese, wife of George R. Taylor. That René Paul died in May, 1851, leaving heirs Gabriel R., Edmund W., Louise A., wife of George Gosnell, Julia, wife of F. B. Beckwith, and the children of his deceased daughter Emile Ham. That René Paul, by his will, after a specific devise of one lot of land, directed his executor to sell and convey, absolutely, all his remaining real and personal estate and directed the disposition of the proceeds thereof. That in June, 1852, the executor Marshall Brotherton, pursuant to the directions in said will, sold and conveyed the land in question to William Fulton and the trustee of Louise A. Gosnell, wife of said George Gosnell, and daughter of said René Paul, for the sum of \$5,150.80. That in payment the receipt of Mrs. Gosnell and her husband was taken for one fourth on account of what was due to her under the will of said René Paul, and one fourth was paid by the note of said William Fulton, payable at six months, secured by deed of trust upon real estate in the city of St. Louis, which note was paid at maturity; the remaining half of said purchase money was secured by the note of said Gosnell and wife and said Fulton, payable two years from date, secured by deed of trust upon the premises sold, which last note was wholly due at the time of the commencement of this suit. That on the 6th day of May, 1853, Louise Gosnell conveyed her interest in said land to said Fulton, who, after the commencement of this suit, paid the balance of said purchase money to the executor of the estate of René Paul, who then entered satisfaction of said deed of trust upon the margin of the record thereof. That, before the sale made to Fulton and Gosnell, the executor made advertisement as is set forth in his amended answer.

“That neither of said purchasers had notice of the trust

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on which said land had been held by said René Paul until the commencement of this suit, but that shortly after the conveyance made to them by said executor, George R. Taylor, one of the plaintiffs, stated to them that he believed he had some right or claim in the said land, or that his wife had, but that he did not intend to prosecute the same; that in 1843, the land in question was not worth more than from three to five dollars per acre, and in 1855 had risen in value to be worth forty dollars per acre; that Gabriel and René Paul were at variance for many years, but were reconciled to each other about one year before the death of Gabriel. Thereupon the court declares that said William Fulton by his said purchase became a trustee of the plaintiffs for one half of the land described in plaintiffs' petition; and this court doth order, adjudge and decree that said William Fulton convey to the plaintiffs, Therese Taylor, Estelle Ulrici, and Adolphe Paul, one undivided half of said land; and this court doth further order, adjudge and decree that the plaintiffs pay the costs of this suit, and all the expenses attending said conveyance.

C. B. LORD."

On the foregoing facts the court below gave judgment that the defendant Fulton was a trustee for the plaintiffs as to one half of the land, and should convey the same to them, and that Brotherton should refund to him the moneys by him received of Fulton on the purchase of said land since the commencement of this suit, with interest, and that the plaintiffs should pay the costs of suit.

The defendant Fulton moved for a review, and the same was refused. He then appealed.

R. M. Field, for appellant Fulton.

FIRST POINT.—The judgment awarding one half the land to the plaintiffs is inconsistent with the trust as found by the court.

The court in the finding of the facts declares that "René Paul held the land in trust to convey the half thereof to Ga-

briel Paul upon request, or, *if no request was made for a conveyance, to sell the same, and to account to said Gabriel for one half the proceeds of the sale*; and that no request was made by Gabriel Paul for a conveyance in his lifetime, nor by his heirs after his death, until after the sale to Fulton and Mrs. Gosnell's trustee."

By the plain terms of the trust, Gabriel, in the event of a sale, was entitled to one half the proceeds of sale, and he was entitled to no more.

The judgment of the court, therefore, giving one half the land to the plaintiffs, and in fact annulling the sale by which the whole had been conveyed to Fulton, was manifestly erroneous.

It would be very absurd to construe the agreement so as to give to Gabriel a right to one half the land after it had been sold.

The sale is in every respect unimpeachable. It only took place till fourteen years after the trust, by public advertisement and full notice to the heirs of Gabriel, and for an adequate and fair price.

SECOND POINT.—No judgment can properly be rendered against Fulton for the proceeds, since he has properly paid the purchase money to Brotherton. The present is not a case where the purchaser is bound to see to the application of the purchase money. Such a case exists only where the sum under the trust is definite and precise. (2 Sto. Eq. 357.) Here, by the very terms of the trust, the proceeds were in the first instance to be received by the trustee, and be *accounted for* by him. In the account to be rendered by René Paul, he would of course be allowed all just disbursements for taxes and other expenses. It would be unreasonable to draw an honest purchaser into such an account.

THIRD POINT.—The circumstances of the case fully warrant the belief that the claims of Gabriel Paul in this property had been compromised with René in the lifetime of the brothers. They were at variance for several years about their mutual dealings in respect to their joint property.

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They settled their differences amicably, and became reconciled. For full ten years after this settlement no interest in this property was asserted on behalf of Gabriel Paul or his heirs.

The judge of the Land Court was satisfied that the brothers had compromised the claim which is now asserted by the plaintiffs, and he seems to have yielded his opinion only in deference to the supposed opinion of this court when the case was here before. But an examination of the report in 25th Mo. will show that the court expressed no opinion on that question of fact, nor does it appear that its attention was directed to the subject.

Lackland, Cline and Jamison, for Brotherton.

Whittelsey, for respondents.

I. This cause has been tried and determined in the lower court in accordance with the decision of this court when this case was before it, as reported in 25 Mo. 156, and that decision is the law of this case. (Chambers' Adm'r v. Smith's Adm'r, 30 Mo. 156; Roberts v. Cooper, 20 How. 467.)

II. The plaintiffs have proved themselves to be owners of an equitable fee in one half of the land, and are entitled to demand a conveyance from the defendant Fulton. (Boyd v. McLean, 1 John Ch. 582, and cases there cited; 2 White & Tud. L. Eq. C., Pt. 1, 560; Dyer v. Dyer, 1 Wh. & Tud. L. Eq. C. 138; see cases cited at former hearing.)

The defendant is a purchaser with notice. (25 Mo. 156; 2 Wh. & Tud. L. Eq. C. 111, 115; 8 Wheat. 241; 8 Mo. 303; 10 Pet. 177.)

III. *a.* The trust by which René Paul was to convey upon request, or to pay one half of the proceeds upon the sale, was personal to himself, and his authority was terminated by the death of Gabriel Paul in 1846, and from that date he held one half as trustee for plaintiffs, and could not sell without their consent.

b. His executor had no authority to sell the equitable fee of the plaintiffs.

c. The defendant had notice of the plaintiffs' title by this suit, while one half of the purchase money was unpaid, and for this money he has judgment.

d. The land was not personalty as between Gabriel and René Paul, but belonged to them as tenants in common, and René could not sell without consent. It was not partnership property, and did not pass to the survivor. (*Lake v. Gibson*, 1 Wh. & Tud. L. C. Eq. 118 Am. Ed. 170; *Coles v. Coles*, 1 Am. L. C. 337, 340, and cases cited.)

BATES, Judge, delivered the opinion of the court.

In the finding of the facts by the court below, it was properly found (from the evidence as preserved) "that said René Paul held the land so purchased upon the trust to convey the half thereof to Gabriel Paul upon request, or, if no request was made for a conveyance, to sell the same, and to account to said Gabriel Paul for one half of the proceeds of sale." This trust does not appear to have been founded upon a personal confidence in René Paul, for Gabriel retained a right to demand a conveyance of his interest, and a sale might be made only in default of such demand. Nor do any of the attendant circumstances indicate that the trust was merely personal. The prime object of the proceedings in partition, which terminated in the conveyance to René Paul, seems to have been to place the land in such condition that it could be readily conveyed to a purchaser if sale should be made of it. This object was well accomplished by vesting the title in René Paul; and if he had sold the whole tract, or any part of it, such sale would have been in conformity with the trust.

Gabriel Paul, too, if he had found an opportunity to sell his half, could have demanded a deed from René Paul, and thus been in condition to convey. No request for a conveyance having been made during the life of René Paul, at his

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death his representatives took the land upon the same trust as he held it, and his executor having sold the land, the purchaser acquired a good title discharged from the trust.

The declaration, therefore, of the court below that Fulton, the purchaser, became a trustee of the plaintiff for one half the land, and judgment in accordance with that declaration, were erroneous. Under the circumstances the plaintiffs may desire to amend their petition, so as to claim only of the executor of René Paul one half the purchase money, and dismiss as to the purchaser of the land. The case will, therefore, be remanded.

The case as now presented to the court differs materially from what it was when formerly before this court, as reported in 25 Mo., p. 157. Then the trust did not authorize a sale by the trustee. As now shown, the authority to sell is expressed.

Reversed and remanded. Judges Bay and Dryden concur.

JAMES B. COLT, Appellant, v. ISRAEL G. BEAUMONT,
Respondent.

Mistake—Specific Performance.—When a contract for the sale of land had been executed by the vendor by his delivery of a deed to the purchaser, in which the grantee was misdescribed by the name of *John*, when his true name was *James*, the vendee was not entitled to bring his action to enforce a specific performance of the contract, but should have filed his petition in equity to correct the mistake in the deed in the description of the grantee.

Practice, affirmative.—The party upon whom the issues in the case throw the burden of proof, should be required to proceed first with his proofs at the trial of the cause.

Appeal from St. Louis Land Court.

The facts are sufficiently stated in the opinion of the court.

N. Holmes, for appellant.

I. This being a suit in equity, the court will look into the

whole record and the evidence to see if there be error in the decree.

II. The answer admitted the affirmative allegations of the petition; the affirmative of the issue made by the answer in setting up a defence, and the burden of proof thereon, rested with the defendant. (1 Greenl. Ev. § 74; Gres. Eq. Ev. 388, "*ei incumbit probatio qui dicit, non ei qui negat.*" Wells v. Pike, 31 Mo. 590.)

III. It appearing by evidence *aliunde* that there is a mistake in the name of the grantee, and that the grantee intended is not named nor described in the deed, the instrument becomes inoperative and void as a grant to James B. Colt, the plaintiff. 4 Cruise, Dig. Tit. 32 Deed, ch. 21, § 10-13, p. 261; 2 Green. Ed. 327, and *n.* 1 & 2; Garnett v. Garnett, 7 Mon. 545; Hill v. Leonard, 1 Pick. 27, "it is essential to the validity of a grant that the parties be named in a deed, or plainly designated, so as to distinguish them from all others." (1 Green. Ev. § 287-90; 1 Cro. El. 328; Jackson v. Stanly, 10 J. R. 133; Arthur v. Weston, 22 Mo. 378; Shep. Touch. 253-7; Williams v. Carpenter, 28 Mo. 453.)

IV. In case of deeds, when the efficacy of the transaction depends upon the instrument itself, if it be written *John* and signed *William*, it is said to be void at law for uncertainty. (1 Green. Ev., § 69, *n.* 3; Williams v. Bryant, 5 Mee. & W. 477, 455, citing Dyer, 279; 1 Stark Ev. 413; Gould v. Barnes, 3 Taunt. 504.)

V. To allow parol evidence to show that John B. Colt really meant James B. Colt, would be to allow parol evidence to introduce new words into a deed in place of those which are there written, and this cannot be done. (4 Cruise, Dig. 2 Green. Ed. 296, *n.* 1, and 297, *n.* 1.)

VI. By the terms of the contract the plaintiff was entitled to have a good and perfect deed, and was not bound to accept an imperfect deed, nor one that required a suit to be brought to correct a mistake.

VII. The effect of the sale under the deed of trust can

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only be to vest back in the defendant whatever title, if any, passed out of him by the deed; and on the filing of this petition the parties stood in the same condition as if no deed had ever been made. But the plaintiff having paid his money and given his notes, is still entitled to have a good and sufficient conveyance of the property to himself. Even if the defendant has put it out of his power to convey the property now, he should still be made to give a good warranty deed, on which damages could be recovered, if the title has been conveyed to another. (*Craigs v. Stillwell*, Litt. Sel. C. 285; *De Riemer v. Cantillon*, 4 J. C. R. 85; *Blessing v. Beatty*, 1 Rob. Va. 287.)

Buchannan, with *Glover* and *Shepley*, for respondent.

I. The court below did not err in requiring the plaintiff to support his claim by evidence. Parties asking the aid of a court of equity, must not only come with clean hands, but with the merits of a good and valuable consideration paid, or an offer to perform all that they are required to do by the contract. (2 Sto. Eq. Ju. § 771, 776; *Thorp v. McCullum*, 1 Gilm. 614; *Delassus v. Poston*, 19 Mo. 425, 429; *Lea v. Chouteau*, 23 Ill. 39.)

II. The error did not prejudice plaintiff's case, if error it were. (*McDermott v. Barnum*, 19 Mo. 204; *Craighead v. Wells*, 21 Mo. 404.)

III. The plaintiff received and gave deeds in which he was named John B. Colt, and he thereby made that name his own, and is estopped from denying that to be his name. (5 Bac. Abr. 593; 3 Chit. Pl. 1143; *Bonner v. Williamson*, 3 Taunt. 503; *Saline v. Johnston*, 1 Bos. & Pul. 60 Sto. Prom. Notes, § 121; 6 Wend. 443; 1 Mood. & M. 516.)

The name is only a means of identifying the person, and the misnomer of which he complains did not entitle him to a decree in his favor. (*Garner v. Stiles*, 14 Pet. 332; *Franklin v. Talmadge*, 5 J. R. 84; *Smith v. Ross*, 7 Mo. 463; 7 Mo. 606.)

IV. If he had any right to correct the mistake complained

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of in a court of equity, he had lost that right before filing his petition. (2 Sto. Eq., § 77, 776; Bruggeman v. Jurgensen, 24 Mo. 87.)

The specific performance of a contract is not a matter of course, but is in the sound discretion of a court of equity. (2 Sto. Eq., § 736; Dunnett v. Hoop, 8 Mo. 374; Southworth v. Hopkins, 11 Mo. 331.) It cannot be maintained on the sole ground of payment of part of the purchase money. (Parker v. Leewright, 20 Mo. 85.)

DRYDEN, Judge, delivered the opinion of the court.

This was a proceeding in the nature of a bill in equity for the specific execution of a contract for the sale of land. The petition charged that the defendant sold to the plaintiff certain real estate in the city of St. Louis for the price of \$6,412.50, one third to be paid in cash and the remainder on credit, to be secured by the notes and deed of trust of the plaintiff on the property. Defendant, to make a deed for the property when the cash payment was made, averred the making of the cash payment and the giving of the notes and deed of trust by plaintiff; averred his readiness and willingness to pay the deferred payment at maturity, but charges that the defendant had "neglected and refused, and still neglects and refuses to convey the lots of ground, or any of them, to the plaintiff, although often requested." The answer of the defendant admits the sale upon the terms stated in the petition, but avers performance of the agreement on the defendant's part by making and delivering a deed for the property to the plaintiff, describing plaintiff therein by the name of John B. Colt. Also, averred that in the deed of trust made by the plaintiff he described himself by the name of John B. Colt; that plaintiff received the deed made by defendant and made no objections to it until after the deferred payments had become due; that on plaintiff's making the objection to the deed, the defendant offered to make plaintiff a new deed to correct the mistake if plain-

tiff would pay the notes then due, or even the interest, but that he refused to do so, and that thereupon the trustees in the deed of trust proceeded to sell, and did sell, the trust property, which was purchased by defendant, but a large portion of which he had sold to strangers before the institution of the suit.

On the trial the evidence showed that the name of the plaintiff was *James B. Colt*, not *John B.* as described in the deed; and in every material respect sustained the allegations in the answer. The court found for the defendant and dismissed the plaintiff's petition. The usual motion for new trial was presented and overruled, and exceptions taken, and the case brought here by appeal. The finding of the court is fully sustained by the law and the evidence. This is no case for a bill for the specific execution of a contract. It cannot, in fairness, be said, as the petition assumes, that the contract of sale was open and unexecuted, although the deed of the plaintiff was made in the wrong name, and, in that respect, materially defective. It was such a document as a court of equity, in a proper case, would, by the exertion of its reformatory power, put in shape and impart validity to. If the plaintiff could have maintained an action at all under the facts as they existed at the time of the institution of the suit, it should have been an action to reform the deed already made, and not an action for a new conveyance. The issues in the case threw upon the defendant the burden of proof, and regularly he ought to have been required to proceed first with his proofs, but the court below ruled otherwise, to which the plaintiff excepted. As a question of practice, we think the court erred; but inasmuch as, in the view we have taken of the case, the error could do him no harm, we are not warranted in reversing for that cause.

The judgment is affirmed, the other judges concurring.

Bompart v. Lucas.

FRANÇOIS BOMPART'S ADMINISTRATOR, Respondent, v. JAMES
H. LUCAS *et al.*, Appellants.

Evidence.—When the plaintiff reads in evidence a portion of an answer of defendant, he must read the whole of a sentence, and not omit that part which qualifies the statement read.

Appeal from St. Louis Court of Common Pleas.

A suit upon the same cause of action with the present, will be found reported in 21 Mo. 598. This suit was brought upon a note, payable three years after date, alleged to have been executed by the defendants, and which was in the hands of a third party who refused to deliver it to the plaintiff, although he was the legal owner thereof and entitled to its possession. It appeared that the note had been deposited with H. L. Patterson as an escrow, until a deed should be executed to the defendants, conveying all the interest of the estate of the intestate to a tract of land in possession of and claimed by defendants. The Supreme Court decided, in 21 Mo. 598, that the Probate Court could not authorize the administrator to make a deed by way of compromise of a claim, and that a tender of a deed from him, made by order of court, did not pass the title of the heirs, there being no necessity for selling the land to pay the debts of the intestate. Bompart left as heirs two sons, who, coming of age after the previous decision, executed their deeds to the defendants and made a tender which the defendants refused to accept, alleging that a tender was not made within reasonable time; and that upon a suit brought and trial had, it had been determined that said Bompart had no title to the land described in the deed; and that the defendants had repudiated the whole contract.

The court below declared that the note sued upon was due and payable three years after date, or as soon thereafter as a proper conveyance was executed, conveying all the title that the intestate had in his life-time in and to the lands mentioned, and that if the heirs upon attaining their majority had executed and tendered good and sufficient deeds, that was a sub-

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stantial compliance with the contract, and then the plaintiff would be entitled to recover.

Glover and Shepley, for appellants.

Knox and Kellogg, for respondent.

BATES, Judge, delivered the opinion of the court.

A case between substantially the same parties, and concerning the same subject matter, was decided by this court at the October term, 1855, and is reported in 21 Mo. 598. In the present case, the court below instructed the jury correctly in accordance with that decision. At the trial of this case, the plaintiff offered in evidence a portion of a sentence of the answer of Lucas in the previous case, and refused to read the remainder of the sentence which materially qualified the effect of the portion read, and the court refused to compel him to read the remainder. This was manifestly wrong; and is only equalled by the case of the infidel who undertook to prove from the Scriptures the want of a deity by reading the words "there is no God," and omitting the preceding words, "the fool hath said in his heart." The defendant, however, read the whole answer as a part of his evidence, and we cannot say that any error was committed materially affecting the merits of the action.

The judgment is confirmed, the other judges concurring.

JOHN WOLFF AND ANN C. SPECK, Appellants, v. L. RUDOLPH WOHLIEN *et al.*, Respondents.

Appeal—Final Judgment.—A judgment of the Circuit Court upon an appeal from the County or Probate Court, refusing to approve the report of sale of the real estate made by the administrator, is not a final judgment from which an appeal lies to the Supreme Court. (R. C. 1835, p. 53, § 20.)

Appeal from approval of Sales.—An appeal lies to the Circuit Court from a judgment of the County Court, approving the report of the administrator's proceedings in the sale of real estate, under the 6 s. d. of § 1, art. 8, of the administration act of 1835. (R. C., p. 63; *Wilson v. Brown*, 21 Mo. 410, affirmed.)

Appeal—Proceedings.—The proceedings in an appeal from the judgment of the County Court in 1857, approving an administrator's sale of real estate made under the R. C. of 1835, must be conducted in accordance with the statutes in force at the time the appeal is taken. (R. C. 1855, p. 1025, § 16.)

Appeal from St. Louis Circuit Court.

After the decision of the Supreme Court, in the case of Speck v. Wohlien, in 22 Mo. 310, deciding that the approval of the administrator's report of sale at the same term at which the sale was made was void, the plaintiff, with John Wolff, the surviving administrator, in 1857, filed their petition in the St. Louis Probate Court, praying an approval of the sale of the real estate made by the administrators at the March term, 1845. They notified the heir, L. Rudolph Wohlien, and Charles Gibson, John Riggin, and Archibald Gamble, who claimed as purchasers of part of the interest and claim of the heir (L. R. Wohlien) to the premises sold. These parties opposed the approval of the sale in the Probate Court, which, at September term, 1857, duly approved the report of the sale made in 1845, from which decision the heir and said Gamble appealed to the St. Louis Land Court. By consent, the venue was changed to the St. Louis Circuit Court, which, upon a hearing of the cause, refused to approve the sale, and the plaintiff appealed to the Supreme Court.

In the Supreme Court, the respondents filed their motion to dismiss the appeal, for the reasons—1. That it was apparent from the record that there was no final determination of the matter; 2. That no appeal lies on the part of the administrator or bidder at the sale from an order of the court below refusing to approve a sale of the real estate; and, 3. That the Supreme Court had no jurisdiction to reverse or revise the order and judgment of the Circuit Court made in the cause.

In the Circuit Court, the appellants moved to dismiss the appeal of respondents from the Probate Court for the reason that it was not taken in accordance with the Rev. Code of 1835, the law in force at the date of the sale; which was overruled.

R. M. Field, C. Gibson, and S. T. Glover, for respondents.

I. There is no final determination of the proceedings of sale from which an appeal can lie.

1. The sale is made, by law, subject to the approval of the court, and until this is done no rights have accrued. If the sale be not approved, the statute declares that "his proceedings shall be void, and the court may order a new sale." (R. C. 1835, p. 53; R. C. 1845, p. —; R. C. 1855.) How can the court order a new sale if the administrator or bidder can appeal from the refusal of the court to approve? "If such report be approved, the sale shall be valid." (R. C. 1835, p. 53, § 25.) No appeal lies from a Probate Court refusing to order a distribution. (*Dyer v. Carr's Ex's.*, 18 Mo. 248.) The approval is the crowning act of the sale. (*Vallé v. Fleming*, 19 Mo. 454.)

2. The object of the law is to protect the estate, deeming that bidders are capable of protecting themselves. No wrong can be done the bidder, for he can bid at the second sale.

3. The order of sale remains unimpaired (if in this case it is not lost by time). (R. C. 1835, p. 53, § 22; R. C. 1845 & 1855.)

4. Wherein is this case different from a judgment in partition where the court refuses to approve the report of commissioners and recommits it to them? In the latter case, this court has held that no appeal lies until a final confirmation of the report. (*Ivory v. Delore*, 26 Mo. 506; *Stephen v. Hume*, 25 Mo. 350.)

5. Refusing to approve the sale and ordering a new one is like the granting a new trial in which no appeal lies.

6. This is not the case where the judge refuses to discharge a legal duty in passing upon the report, nor is the question raised as to whether he could be compelled to pass upon the validity of the sale. He has discharged his duty, and has held that the sale was "fraudulently brought about and conducted by the purchaser, who was one of the administrators, for her own profit," and has refused to approve it.

II. The sale is made upon the condition that it shall be approved by the court, and the lawful exercise of this discretion cannot be complained of by the administrator, who is the instrument of the court, and subject to its orders. Nor has the administrator any interest in the real estate. The bidder has no right to appear or appeal. (R. C. 1835, p. 53, § 20.) His bid being an offer to purchase *upon condition* that the court shall approve the sale, he cannot complain. An appeal lies where there is an approval, for this is a final judgment. (Wilson v. Brown, 21 Mo. 410.)

B. A. Hill and *A. Burwell*, for appellants.

I. The approval of the sale of June, 1845, made in June, 1857, by the Probate Court, on the petition of the surviving administrator, is final and conclusive upon the question as between the heir and the administrator, and no appeal lay to the Circuit Court from the order of approval, except upon the conditions of the act of 1835, under which the proceedings were had for the sale of this property.

An appeal would lie from the order of sale made in March, 1845, but not one of the twelve subdivisions gives any appeal from the order of approval of the sale.

The second section of the act of 1835, title Adm'n, art. viii., declares that in all proceedings under this act not above enumerated, the order or decision of the County Court shall be final.

The approval by the Probate Court of the sale of June, 1845, as made in June, 1857, was of the sale made under the act of 1835, under which all the proceedings for the sale were had, and the practice is governed by the laws in force when the proceedings were had, and the confirmation must of necessity relate back to the day of sale, and operate as an approval of that day. Therefore, as no appeal lay under either of the twelve subdivisions of section one, of article eight, of Code of 1835, section two makes the approval of the Probate Court of the sale final. The case in 21 Missouri arose under the act of 1845, and there is no doubt that an appeal lay under

the act of 1845. The question was not before the court whether an appeal would lie under the act of 1835. (See *Goelet v. Lansing*, 6 John, ch. 75.)

As to the effect of an approval by the Probate Court, in 1845 and 1857, that is quite another question, and will be determined when the parties claim title to the land under the approval and deed.

The sole object of the proceedings under the order of the Probate Court in 1857, is to cure a technical defect in the forms of approval of the sale of June, 1845.

It has been decided by this court, in the case of *Speck v. Wohlien*, 22 Mo. 314, that the approval having been made at a time when the heir was not in court, and not required to be there, he had no opportunity to take an appeal; and, therefore, that the approval was void as made in June, 1845.

The question as to the effect of the approval was not before the court, and the brief of the counsel of the plaintiff, Mrs. Speck, does not show that the point was raised as to the effect of the approval in 1845.

The approval was irregular, for the reason that it was made at the same term as the sale, and was held to be void for that reason; but it is a mistake to aver that it was void because the heir could not take an appeal, or had no opportunity of doing so. The appeal could only be taken from the order of sale under the act of 1835, and the approval was final if made according to the statute. If the approval be void or voidable, it is for irregularity; for no appeal lay from the order of approval according to the act of 1835.

In the same case of *Speck v. Wohlien*, 22 Mo., this court intimated an opinion that the defect might be remedied by the Probate Court on notice to all those interested, (p. 317.) The better opinion seems to be that the approval was only voidable for irregularity, and a subsequent approval at any time, on notice, would make the sale valid and effectual, and cure the irregularity. (See also *Vallé v. Fleming*, 19 Mo. 464.)

Under this view of the case, the petitioner, Mrs. Speck, in

accordance with the intimation of this court, moved the Probate Court, on notice to all parties, for an approval of the sale of 1845. The court approved the sale of 1845, and the defendants filed their affidavit and bond for an appeal in accordance with the statute of 1855.

By the act of 1835, under which these proceedings were had, the appeal, if allowable on the order of approval in 1857, would not authorize a trial *de novo* in the Circuit Court, but only brought up the record. Sections six, seven and eight, article eight, Code 1835, provide for a bill of exceptions, a transcript, and a determination of the points or decisions excepted to; and if there be an error on any material question of law or of fact, a new trial shall be granted, &c. It has been pretended, in the Circuit Court, by the defendants, that the appeal from this last approval of 1857 is governed by the statute of 1855. This is not so, as will be seen from an examination of the eighth article of 1855, p. 174. The twelfth subdivision of section two, article eight, adds to the Code of 1835 the following further grounds of appeal: "and in all other cases where there shall be a *final decision* of any matter arising *under the provisions* of this act." The same provision is found in the Code of 1845. It is clear that this additional ground of appeal only applies to the cases that arose under the acts of 1845 or 1855. This case did not arise under either of those acts, but under the act of 1835. The order of approval applied to the sale made and proceedings had under the act of 1835, and the practice must be in accordance with the Code of 1835, under all the analogies of the practice. There is no escape from this conclusion, if the spirit or letter of the statute be regarded. (See *Goelet v. Lansing*, 6 John, ch. 75.)

The Circuit Court, then, had no power to try the case *de novo*, and the appeal brought up nothing but the appraisement, notices of sale, and the petition, answer and order of approval. There was no error of law on the face of the record, and the decision of the Probate Court should have been affirmed, even if it be held that an appeal would lie in such a

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case. (See *Davis v. Davis*, 4 Mo. 204; *Chouteau v. Consone*, 1 Mo. 350; *Mullanphy v. St. Louis County Court*, 6 Mo. 563, and *Rev. Code of 1835, 1845, and 1855, tit. Adm'n, art. 8*; *Lacy v. Williams*, 27 Mo. 280; *Chouteau v. Nuckolls*, 26 Mo. 278; *County of St. Louis v. Sparks*, 11 Mo. 203.)

The plaintiff raised this question distinctly by instructions. The defendants have even had the boldness to move to dismiss the appeal of plaintiffs on the ground that no appeal lay to this court in such a case. The judgment of the Circuit Court should therefore be reversed, and the approval of the sale by the Probate Court affirmed.

DRYDEN, Judge delivered the opinion of the court.

It appears from the record that, in August, 1842, Diederich Wohlien died seized of three and a half acres of land in commons of St. Louis—the property in controversy—leaving a widow, Ann Wohlien and one child (the respondent, L. Rudolph Wohlien,) his only heir. Soon thereafter, his widow and the appellant Wolff were appointed the administrators of the estate by the St. Louis Probate Court; and at the March term, 1845, of said Probate Court they procured an order for the sale of the real estate to pay the debts of the deceased; and at the June term, 1845, they sold the same at auction, when Ann Wohlien, the widow and administratrix, became the purchaser of the premises in controversy for the sum of four hundred and twenty dollars. A report of the sale was made by the administrators to the Probate Court and approved at the same term at which the sale was made. No further action of the court in regard to the sale or report was had until that hereinafter mentioned. In 1846, Mrs. Wohlien sold the premises in controversy to Mrs. Speck, the appellant. About the year 18—, a final settlement of the estate was made by the administrator, and soon thereafter Mrs. Wohlien died. At the June term, 1857, of the Probate Court, the appellants, Mrs. Speck and John Wolff, presented their petition praying said court to approve said sale—they having first notified the respondents of their intention to present the petition, and its

purpose. The respondents appeared and answered the petition, urging numerous reasons why the sale should not be approved, but not necessary for the purposes of the case to be stated here. A trial was had, and the court took the case under advisement until the September term, 1857, when it made an order approving the sale, from which the respondents appealed, without any bill of exceptions, to the Land Court, where, by consent, the venue was changed to the Circuit Court, in which a trial anew was had, which resulted in an order reversing the judgment of the Probate Court, and disapproving the said sale, from which the appellants appealed to this court.

From the view we have taken of the question of the jurisdiction of this court we shall be obliged to forego an investigation of the merits, and suffer the case to stand where the Circuit Court left it, and we might content ourselves with the disposition of the question of our own jurisdiction; but as the counsel have discussed in the argument several other questions of jurisdiction, and desire us to give our opinion upon them, we will do so in the order in which the questions arise in the progress of the case.

1. When the case reached the Circuit Court by appeal, the appellants in this court, Speck and Wolff, respondents there, presented the question, and urge it in this court, "Does an appeal lie from the Probate to the Circuit Court, from an order of the former approving a sale of real estate made by an administrator to pay debts?"

The question is made upon the phraseology of the sixth subdivision of the first section of the eighth article of the administration law of 1835, (R. C. 1835, p. 63,) which reads as follows, in its connexion with its head: § 1. "Appeals shall be drawn from the decision of the County Court [Probate Court] to the Circuit Court in the following cases."
"Sixth. On orders for the sale of slaves and real estate."

The appellants make a distinction between the order of sale and the succeeding order approving the sale, and insist that while an appeal is given from the first order it is denied

the second. The same question was before this court in the case of *Wilson et al. v. Brown's administrator*, (21 Mo. 410,) and the same distinction was attempted to be made, when Judge Ryland, in delivering the opinion of the court, said: "It will not do to limit the appeal to the first order made in regard to the sale to the order directing the sale only, and not to any other orders made concerning such sale." "We read the sixth clause thus: 'On all orders *concerning* the sale of slaves and real estate.'" The court further says: "We, then, answer the question in the case in the affirmative, having not the least doubt that an appeal will lie in this case"—a case of an appeal from an order approving an administrator's sale. But the appellants object to *Wilson v. Brown* as authority in this case, because the opinion was made under the law of 1845, which changes the law of 1835, which, it is urged, governs the appeal in this case by adding to the twelfth subdivision of the section classifying the cases in which an appeal shall be allowed the following words, viz: "And in all other cases where there shall be a final decision of any matter arising under the provisions of this act." (R. C. 1845, p. 106.) It is true the case of *Wilson v. Brown* was decided under the law of 1845, but it is likewise true the decision was distinctly based upon the construction of the sixth subdivision of the section, which is identical with the corresponding sub-division in the law of 1835, without the slightest allusion to the additional words in the twelfth subdivision as a ground of support. We, then, concur with the court in the case of *Wilson v. Brown* in answering the question that an appeal does lie from the Probate to the Circuit Court on orders approving the sale of real estate to pay debts.

2. The proceedings for the sale of the land, it will be observed, were initiated under the law of 1835, by which the Circuit Court as to cases brought from the County Court was merely a court of review for the trial of questions arising upon the record, (R. C. 1835, p. 63,) and not a court for the trial of questions of fact *de novo*, as under the law of 1845 and 1855. The trial of the motion to approve was had

in the Probate Court, and the appeal taken, without any bill of exceptions, while the law of 1855 was in force, and just as if the proceedings had all transpired under this law.

In this state of the case, the question is made by the appellants whether there was anything brought into the Circuit Court by the appeal which it could lawfully try, and whether it ought not to have dismissed the appeal on appellants' motion.

This involves the question whether the law in force at the commencement of the proceeding, or that at the time of the trial shall, determine the manner of the appeal and the jurisdiction of the appellate court. This question is answered by section 16, ch. 101, R. C. 1845, p. 698, and carried into the revision of 1855 in these words :

" § 16. No action, plea, prosecution, civil or criminal, pending at the time any statutory provision shall be repealed, shall be affected by such repeal, but the same shall proceed in all respects as if such statutory provision had not been repealed, except that all such proceedings had after the time of taking effect of the revised statutes shall be conducted according to the provisions of such statute, and shall be in all respects subject to the provisions thereof so far as they are applicable."

We say, then, that the law in force at the time of the trial was the law that controlled the appeal, and that in this case the appeal was well taken, and the Circuit Court properly refused to dismiss it.

3. The last question for our consideration made by the respondents is, "is the order of the Circuit Court *disapproving* the sale such a final decision as may be appealed from?"

The law requires the executor or administrator, at the next term after the sale, to make a full report of his proceedings, (R. C. 1835, p. 53, § 20,) and " § 21. If such report and proceedings of the executor or administrator be not approved by the court, his proceedings shall be void, and the court may order a new sale, upon which the same proceedings shall be had as upon the original order." " § 22. If such report be approved, the sale shall be valid," &c.

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It is plain to be seen, that until a sale of the estate proposed to be sold is approved by the court, it still retains its power and jurisdiction over the subject of the proceedings, and while this is the case, it cannot be said there has been any final decision. It may be likened to the judgment of a court granting a new trial which it requires; the citing of no authority to prove is not such a final decision as may be appealed from, or to the refusal of a Probate Court to order distribution which has been held by this court not to be such final decision as may be appealed from. (18 Mo. 246.)

We are clearly of the opinion no appeal lay in this case from the judgment of the Circuit Court disapproving the sale, and that its judgment must stand.

The appeal from the Circuit Court is therefore dismissed. Judge Bay concurring; Judge Bates not sitting.

CHARLES S. HEMPSTEAD, Respondent, v. THOMAS HEMPSTEAD'S
ADMINISTRATOR *et al.*, Appellants.

Release—Covenant not to sue.—A judgment was rendered June 7, 1823, in favor of the United States against A and B upon an official bond, in which B was principal and A was security. B died, leaving a widow and a daughter, his only heir. Part of the judgment was levied of the property of A. C, being the owner of lands to which the heir of B set up a claim, obtained a transfer of the judgment from the United States, and procured a revival of the judgment against A and the administrator of B, in March, 1851. The revived judgment was allowed against the estate of B by the St. Louis Probate Court on June 15, 1852, for \$34,772.34, and placed in the fourth class of claims. At the March term, 1852, of said court, a claim in favor of A was allowed against the estate of B for the sum of \$10,244.67, and placed in the fifth class. A compromise was made between C and the heir of B, on December 7, 1849, and C made a covenant with the widow and heir of B, that he would not use the judgment against the estate and the lands descended, with the exception of the lands claimed and owned by C, and also reserved to himself the right to use the judgment against A and his property. Of this covenant A was cognizant, and by his agent made an agreement with C, and for the consideration of \$4,000 C covenanted with A that he would not use the judgment against A, except to protect his title to the lands specified in the covenant with B's heir. By order of the Probate Court, the lands of B were sold, and at a final settlement there was a balance in the hands of the administrator of B, the proceeds of

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lands not specified in the covenant, to the amount of \$6,638.55, which the Probate Court ordered to be paid upon the claims allowed in the fourth class, which left nothing for the claim of A. A brought his suit, alleging that the covenant of C with the heir of B was a release of the judgment, which, by collusion and fraud between C and the administrator of B, had been fraudulently revived and allowed, and praying that the judgment of C might be postponed, and that the moneys in the hands of the administrator might be applied to the payment of the claim allowed in favor of A. *Held*, 1. That the covenant of C, with the widow and heir of B, was not a release of the judgment, and could not have been so pleaded. 2. That although A was a security, yet as he was cognizant of that compromise, and had himself made a similar arrangement with C, he had no equity which gave him a right to require that his claim should be preferred to the judgment of C. (See same case, 27 Mo. 187.)

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The finding of the court below is set out in the opinion. The deeds referred to, or covenants of Biddle with the heir of Thomas Hempstead, and the covenant with the plaintiff, were as follows:

"I, John Biddle, of Detroit, in the State of Michigan, hereby covenant and agree with Cornelia Hempstead, widow, and John D. Wilson and Cornelia V., his wife, (which Cornelia V. is child and sole heir of said Thomas Hempstead,) in manner following, that is to say: Whereas, I am the owner and assignee of a certain judgment, rendered in the United States District Court for Missouri, on the 7th day of June, in the year 1823, for the sum of \$13,497.27, in favor of the United States, against Thomas and Charles S. Hempstead; and, whereas, I have compromised a certain suit in chancery, this day, wherein said John D. Wilson and wife and Charles Gibson are complainants, and myself and John O'Fallon are defendants, and they have quit-claimed all their right in the land in controversy in that suit, and agreed to dismiss that suit and a part of the consideration for such quit-claim and dismissal of said suit and release of their cause of action therein, is the release of the estate of said Thomas Hempstead from said judgment as hereinafter specified. Now, therefore, I hereby, for myself, heirs, representatives and assigns, agree and covenant that said judgment shall never

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be used or enforced in any manner against the heirs or administrators of said Thomas Hempstead, unless for the purpose of affecting the two pieces of land of forty arpens and of five arpens hereinafter mentioned, nor against any property belonging to his estate, or to his heirs, as derived from him at any time, except, however, the tract * * * against which said two pieces of land, I reserve the right of using said judgment as I may see proper, and also of using the name of the heirs and representatives of Thomas Hempstead, deceased, for the purpose of selling, or otherwise affecting the same lands, but always at the proper cost of myself or my representatives. And I also have the right of using said judgment against Charles S. Hempstead and his property; but, with the exception of the whole of the said forty arpens, and of the said five arpens, I am not to use or enforce said judgment, so far as the same can be made to affect the heirs, executors or administrators of the said Thomas Hempstead, or any property owned by them, or any of them, as such heirs, or executors, or administrators.

“In testimony whereof, I have hereto set my hand and seal, this 7th day of December, 1849.

JOHN BIDDLE, [L. S.]”

“This agreement, made between John Biddle, of Detroit, Michigan, of one part, and William Hempstead, of Galena, Illinois, of the other part, witnesseth, that the said William Hempstead agrees to pay said Biddle four thousand dollars, and in consideration of such payment the said Biddle covenants with the said William Hempstead, his executors, administrators and assigns, that a certain judgment rendered in the United States District Court for Missouri, on the 7th day of June, in the year 1823, in favor of the United States against Thomas Hempstead and Charles S. Hempstead, for the sum of thirteen thousand four hundred and ninety seven dollars twenty-seven cents, shall not be enforced against Charles S. Hempstead, or his representatives, or property, except so far as * * * which excepted parcels of ground said Biddle may use said judgment, and proceed in any man-

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ner deemed advisable, in the name of Charles S. Hempstead as one of the defendants, or otherwise. The judgment aforesaid is now owned and controlled by the said John Biddle.

"In testimony whereof, the said parties have hereto set their hands and seals, this 22d day of December, 1849, to duplicates hereof.

JOHN BIDDLE, [L. S.]

WILLIAM HEMPSTEAD, [L. S.]"

Glover & Shepley, for appellants.

I. The plaintiff having failed to plead the release to the suit to revive the original judgment, is estopped from now setting up what should have been a matter of defence in that suit. (10 Mo. 382.)

II. After the revival of the judgment, the Probate Court was bound to allow it. (Wood et al. v. Ellis, 12 Mo. 616.)

III. There is no fraud shown of any kind. The deed was not a release of the judgment, nor was it so intended. The plaintiff knew of the arrangement, and made one of a similar character for his own protection. He has never paid the judgment, and is not injured by the use made of it.

Jones & Sherman, with *J. E. Munford*, for respondents.

I. The instrument of writing signed by Biddle was a release of the judgment in favor of the United States. (27 Mo. 188.)

II. The judgment having been released, the plaintiff was entitled to be paid his debt.

BATES, Judge, delivered the opinion of the court.

This case was before this court in 1858, and is reported in 27 Mo. 188. It was then remanded to the Circuit Court, where the plaintiff filed a supplemental petition stating that Wilson had made a final settlement of the estate of Thomas Hempstead, showing a balance in his hands, which had been ordered to be paid to creditors whose claims were in the fourth class, (that is, to John Biddle,) and charging that that settlement was fraudulent as to plaintiff.

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The defendants answered the supplemental petition, denying fraud, &c.

The case was then tried before the Judge of the Circuit Court, who gave a finding of facts and judgment as follows:

"Now at this day come the parties by their respective attorneys, and, waving a jury, submit this cause to the court upon the pleadings and proof, and the court having duly heard and considered the same, doth find—

"1. That on the seventh day of June, eighteen hundred and twenty-three, a judgment was rendered in favor of the United States against Thomas Hempstead and Charles S. Hempstead, the complainant herein, for the sum of thirteen thousand four hundred and ninety-seven dollars and twenty-seven cents, on the official bond of said Thomas Hempstead, wherein said Thomas Hempstead was principal, and said Charles S. Hempstead was security.

"2. That said John Biddle obtained the control and ownership of said judgment, with power to release the same.

"3. That said Thomas Hempstead died and left one child only, a daughter, his sole heir, Cornelia V. Hempstead.

"4. That said John Biddle, on the 7th day of December, 1849, for good and sufficient considerations, one of which was the withdrawal and dismissal of certain suits that had been instituted by the heir of Thomas Hempstead against the said Biddle and others, and the conveyance by the heir of Thomas Hempstead to Biddle of two certain tracts of land, the subject of said suit, released by instrument of writing the heirs, executors and administrators of Thomas Hempstead from said judgment, except so far as might be necessary to use it for the protection of the title to the land which Biddle obtained by said conveyance from said heir.

"5. That said release was never entered of record, but was kept by the agent of said John D. Wilson; that said John D. Wilson was advised by counsel, and believed, that the paper called release was no release at all, and acted upon such hypothesis.

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"6. That said judgment was kept afoot in fraud of the complainant in this cause.

"7. That in the year 1848, said defendant, John D. Wilson, married the said Cornelia V. Hempstead, the said sole heir of Thomas Hempstead.

"8. That, in June, 1850, letters of administration were granted to defendant Wilson, by the Probate Court in and for the county of St. Louis, State of Missouri, upon the estate of Thomas Hempstead.

"9. That in the month of March, 1851, the said judgment against said Thomas and Charles Hempstead was revived in favor of the United States, to the use of said Biddle, fraudulently.

"10. That said judgment so revived was presented in the Probate Court for allowance by the said Biddle; the same was fraudulently procured to be allowed, and was allowed on the 15th day of June, 1852, to the amount of \$34,772.34, and placed in the fourth class of claims allowed against the estate of Thomas Hempstead, in fraud of the plaintiff's rights.

"11. That at the March term, 1852, of said Probate Court, a claim was allowed by said court in favor of this complainant, Charles Hempstead, against the estate of Thomas Hempstead, amounting to \$10,244.67, for money paid by this complainant upon the aforesaid judgment against said Thomas Hempstead and this complainant, and the said claim so allowed was placed in the fifth class of claims allowed against said estate of Thomas Hempstead.

"12. That no other claims have been allowed against, nor are any other debts owing by, said estate than the said judgment and allowances.

"13. That property to a large amount belonging to said estate of Thomas Hempstead came into the hands of said John D. Wilson, as administrator as aforesaid of said estate.

"14. That said Wilson, as administrator as aforesaid, procured an order from the said Probate Court to sell real estate belonging to the estate of said Thomas Hempstead, and that at the December term, 1852, of said Probate Court, in pursu-

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ance of said order, he sold such property, and recovered therefor the sum of \$7,630; and that at the September term, 1855, of said Probate Court said Wilson sold the property belonging to said estate, for which he received the sum of \$957.

"15. That nothing has ever been paid upon said judgment allowed in favor of said Biddle by said administrator of said estate.

"16. That at the March term, 1857, of said Probate Court, said defendant Wilson made a final settlement of his administration of the estate of said Thomas Hempstead, and that there remains in his hands \$7,410.55 assets of said estate, of which sum \$772 are the proceeds of sale of lands excepted in said instrument of release from the operation of said release.

"17. That there remains in the hands of the administrator, John D. Wilson, assets of the estate of Thomas Hempstead, the sum of \$6,638.55, independent and exclusive of the proceeds of sale of said one by forty arpens of said land, and said one by five arpens of land, spoken of and excepted in said share.

"18. That the said Probate Court, at the time of said final settlement, ordered said Wilson to pay over said assets of said estate of Thomas Hempstead to the creditors of said estate whose claims had been placed in the fourth class of claims allowed against said estate.

"19. That said judgment allowed against the estate in favor of said Biddle is the only claim allowed in said fourth class, and is much more than enough to exhaust all the assets of the estate:

"Wherefore, it is ordered, adjudged and decreed by the court, that the order made by the Probate Court, in and for the county of St. Louis, directing said John D. Wilson, administrator of the estate of said Thomas Hempstead, to pay to the creditors whose claims allowed are placed in the fourth class the assets in his hands, be annulled, set aside and revoked, except the payment of \$772; and it is further ordered, adjudged and decreed, that the judgment of \$34,772.54 allowed

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in favor of John Biddle, in the Probate Court in and for the county of St. Louis, against the estate of Thomas Hempstead, placed in the fourth class of claims allowed against said estate, be postponed to the claim allowed against said estate in favor of Charles S. Hempstead placed in the fifth class, and that the said Wilson be restrained from paying over any of the assets remaining and found in his hands at the time of said final settlement to said John Biddle, except said \$772; and it is further ordered, adjudged and decreed, that said Wilson pay the said sum of \$6,638.55 in payment of said claim and allowance of said Charles S. Hempstead, the complainant in this cause, so far as the same will go; and that the complainant have execution for the same and his costs."

When the case was here before, the only question was whether the court below properly rejected as evidence the paper supposed to be a release by John Biddle of a judgment of the United States against Thomas and Charles S. Hempstead, and this court held that the paper should have been admitted in evidence, upon the ground stated in Judge Scott's opinion that thereby the judgment was released, except so far as it might be necessary to use it for the protection of the title to the land which Biddle obtained by his compromise with the heir.

This result was attained by an equitable construction of the instrument in connection with the attending circumstances. In the case as now appearing in this court, the pleadings are somewhat changed, and facts are shown which do not appear by the report to have been known to the court when formerly considering the case, and we are therefore required to examine the whole case anew.

The plaintiff's claim is, that the judgment was released by John Biddle, and the court below has so found, except so far as it might be necessary to use it for the protection of the title to the land which Biddle obtained by conveyance from the heir of Thomas Hempstead.

The terms of the instrument show that it is not an absolute release, but the judgment was to be kept in life and force for

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certain purposes, and the court below has found that the only exception to the release was for the protection of certain specific property, whilst the instrument itself declares that "I (John Biddle) have the right of using said judgment against Charles S. Hempstead and his property, but with the exception of the whole of the said forty arpens, and of the said five arpens, I am not to use or enforce said judgment so far as the same can be made to affect the heirs, executors or administrators of the said Thomas Hempstead, or any property owned by them, or any of them, as such heirs or executors or administrators." This exception is of the greatest importance, as it not only shows that the judgment was not released, but that the power was expressly retained to use the judgment against this very plaintiff, and so to use it as not to injure the heir or administrator of Thomas Hempstead. This may appear to have been very ungenerous in the heir of Thomas Hempstead who made the agreement with Biddle, but we are now regarding only the meaning of the paper itself, without regard to extrinsic facts.

Evidently this paper could not have been pleaded in bar of a revival of the judgment, and to call it a release is a misuse of the term leading to a confusion of ideas.

Discarding, then, the idea of a release of the judgment, we must still look to the instrument to ascertain its proper meaning and effect in reference to all the facts of the case and the persons affected by it.

It appears that Cornelia V. Wilson, the heir of Thomas Hempstead, was prosecuting suits against Biddle, and that Biddle had acquired the judgment of the United States against Thomas and Charles S. Hempstead, with the intention, it may be presumed, to use it in some way to defend or protect his title to the land for which he was sued by Mrs. Wilson, and that a compromise was made between them, and this instrument given by Biddle as a part of the consideration paid by him for the compromise. The paper was evidently intended only for the benefit of the heir of Thomas Hempstead, and the idea of any benefit to Charles S. Hempstead is expressly

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excluded, and the paper is a covenant only not to use it to the detriment of the estate of Thomas Hempstead. It was a contract only between the parties to it, which they could act upon or not, or alter or rescind at their pleasure, and the plaintiff has no right to question their action, provided he be not injured or defrauded thereby. We must, therefore, inquire whether he has been injured or defrauded by the defendants. The Circuit Court has, in its finding of facts, found that the judgment was kept afoot in fraud of the plaintiff; that it was revived fraudulently, and that it was presented for allowance and allowed fraudulently. These findings of fraud were evidently based upon the erroneous notion that the instrument granted by Biddle was a release of the judgment for the benefit of Charles S. Hempstead; but even upon that idea the evidence does not justify the findings, for the plaintiff had knowledge of the arrangement, and his brother, acting as his agent, expressed himself well satisfied with it, and made with Major Biddle a somewhat similar arrangement, whereby, for the payment of four thousand dollars, Biddle bound himself not to use the judgment against his property, with certain exceptions. The court below found that the administrator, Wilson, was advised by counsel and believed that the paper called a release was no release, and acted upon that hypothesis. Wherein his fraud consisted, it is impossible to see. Either of the allowances to the plaintiff and to Biddle against the estate of Thomas Hempstead is more than sufficient to absorb the whole estate, and the debt to Biddle being by law of superior merit to that owing to Charles S. Hempstead has rightful priority, and until that was wholly paid the plaintiff could have neither legal nor equitable right to any part of the assets of the estate. If Mrs. Wilson has by contract with Biddle induced him to accept less than the full amount of his judgment, the plaintiff has no right to complain of it, for he is not thereby injured.

If no contract had been made with Biddle, certainly the plaintiff could get nothing from the estate of Thomas Hempstead until Biddle's claim was fully satisfied, and upon no

computation is it shown that the estate was sufficient to pay half of the debt to Biddle. He could have received nothing then, and there was, therefore, no possibility of his having been injured by the arrangement made between Mrs. Wilson and Biddle.

The judgment not being absolutely released at law, he can only claim that in equity and good conscience it should be postponed to his demand, and the case made does not show him entitled to such relief, for he is made no worse off by all that has been done. This is said without reference to the fact that he himself has procured Biddle's covenant not to use the judgment against his property. When this fact is considered, it would appear grossly inequitable to hinder Biddle from collecting what he can from the estate of Thomas Hempstead.

The judgment of the court below will be reversed and judgment rendered by this court for the defendants.

Judges Bay and Dryden concur.



JOHN WALKER *et al.*, Appellants, v. CHARLES E. BACON *et al.*,
Respondents.

Limitations.—In an action by a purchaser under a judgment, execution and sheriff's sale, against defendants in possession under a deed from the judgment debtor, alleged to be fraudulent as against creditors, the statute commences to run from the date of the possession taken under the fraudulent deed.

Limitations—Disability.—Where the statute of limitations has run against a claim to land by tenants in common, if they join in the action, the disability of one tenant will not avail his co-tenant, but both will be barred. (Keeton's heirs v. Keeton's administrator, 20 Mo. 530-544. Affirmed.) See note at end of the case.

Appeal from St. Louis Land Court.

Plaintiffs by amended petition alleged in substance, that on the 1st June, 1853, they were entitled to the possession of four hundred and eighty arpens, in Bonhomme township, St.

Louis county, on the southern shore of the Missouri river, being the same conveyed by Alexander McCourtney and wife to John McCourtney, and recorded in Book E, page 35, of St. Louis county records; that on the 30th March, 1829, John McCourtney, being still the legal owner and entitled to the possession of said premises, conveyed, through the sheriff of St. Louis county, by sale, under execution against said John McCourtney, to Josiah Spalding, by deed duly acknowledged and recorded; and afterwards, on the 28th October, 1829, by duly acknowledged and recorded deed, said Spalding and wife conveyed said premises to Thomas Sloan, one of plaintiffs, and to Solomon G. Krepps, the ancestor of the other plaintiff, as tenants in common, whereby they became entitled to the possession of said land; and defendants on the 10th June, 1853, entered into said premises, and claimed to hold them under one Martin McCourtney, deceased, formerly husband of defendant, Ann McCourtney, and lessor of the other defendant, James E. Bacon.

Plaintiffs alleged further that said Martin McCourtney in his life-time, and at his death in May, 1853, claimed to hold said land under a voluntary deed from John McCourtney, who was his father, which deed, dated 1st January, 1822, was wholly without consideration, fraudulent and void as against plaintiffs in the judgment under which said Spalding bought said land, and fraudulent and void as against said Spalding, purchaser under said judgment and execution, and also as against plaintiffs, who claim through said Spalding; and plaintiffs also alleged, that, at the time of said voluntary conveyance by said John to said Martin, the said John was greatly in debt and insolvent; and said defendants being now in possession of said premises, unlawfully withhold the possession of the same from plaintiffs, to their damage, &c.; and plaintiffs ask for judgment of possession and for damages.

Defendants deny that plaintiffs are entitled to possession as alleged, and have no knowledge or information whether, on 30th March, 1829, said John McCourtney, through the sheriff, conveyed said land to said Spalding; nor whether said deed

was duly acknowledged and recorded; nor whether Spalding and wife conveyed to Sloan and Krepps as alleged; nor whether this deed was acknowledged and recorded as alleged.

Defendants deny that the deed of John McCourtney of 1st January, 1822, to Martin McCourtney was wholly without consideration, fraudulent and void as against plaintiffs in the judgment named, said Spalding, and plaintiffs; also, that, at the time of said conveyance from said John to said Martin, said John was greatly in debt and insolvent; and deny that defendants unlawfully withhold, &c.

Defendants also allege that they, and those under whom they claim, have had peaceable and undisturbed possession of said premises for more than twenty years next before commencement of this suit, under a claim of title good as against all the world, and which possession is adverse to plaintiffs and all others, and they deny they unlawfully withhold, &c.

The instructions are given in the opinion of the court.

M. L. Gray, with *J. D. Coalter*, for appellants.

I. The judgment of the St. Louis Circuit Court in favor of Adam Jacob's administrator v. John McCourtney should have been admitted in evidence.

II. John McCourtney's application for the benefit of the insolvent law of Pennsylvania should have been admitted in evidence.

III. The injunction bill of Martin McCourtney and Thomas Sloan and Krepps should have been admitted in evidence as a whole.

Defendants were in privity with said Martin and claimed under him by descent, and were therefore bound by his statements about his title. (1 Greenl. Ev. 23, 189, and authorities therein cited.)

The bill was sworn to by Martin McCourtney, and thus is brought fully within the rule, and the whole of it should have been read in evidence. (1 Greenl. Ev., § 551, and note 4, and authorities there cited.)

IV. The statute of limitations did not begin to run against plaintiffs, Sloan, and Krepps, the ancestor of the other plaintiffs, till they acquired title through sheriff's sale, in March, 1829. (See limitation act of 17th December, 1818; 1 Territorial Laws, p. 598, and 2 vol. R. C. 1825, p. 511; 26 Mo., p. 291 & 300; 3 Conn. R. 191.)

Until such title was acquired, plaintiffs had no right of action. The right of action accrued only when the sheriff made a deed to Spalding in March, 1829.

Defendants seem to admit this proposition.

V. The first instruction refused to plaintiffs should have been given. The proposition stated in the instruction is that possession under a void and fraudulent deed cannot be made available under the statute of limitations against a party claiming under a valid deed. The authorities are numerous, and, I believe, uniform, in favor of this position. They are collected in Tillinghast's, Adams on Ejectment, in Appendix, from page 455 to page 560, of 4 ed., 1854, with Waterman's notes, top paging. Also, when possession began in or by a fraud, or fraudulent deed. (See same book, top page 560 to 564.)

VI. The second instruction refused to plaintiffs should also have been given. The proposition contained in it seems to me to be so plain that it needs no argument. If the conveyance was fraudulent and void against Jonathan Walton, the creditor, it must be equally fraudulent against the purchaser under Walton's judgment, else Walton could not get the benefit of the fraud by a sale of the property. (See 22 Mo. 193; 23 Mo. 579; 27 Mo. 560.)

VII. Also, the third instruction refused should have been given. It would be monstrous to say that defendants could stop the prosecution of a suit for the recovery of the land by injunction for five years, and when said obstacle, interposed by defendant, was removed by the courts, that defendant could then turn round and plead this very delay as a bar to plaintiff's recovery. To permit this, would be enabling defendants to take advantage of their own wrong. If such

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be the law, a defendant need only get an injunction and keep it alive by appeal or otherwise till time enough has elapsed to protect him, then plead the statute, and he would be safe. I do not think the courts would permit themselves to be used to perpetuate such injustice.

Our statute declares the time thus lost shall not be counted to a defendant. (13 Vt. 288; 1 Maryland Chy. Dec., p. 182; 2 Stockton, Chy. R., 347; see, also, last proviso of 1 sec. of limitation act of 1825, R. C. 1825, 2 vol., p. 511.) This prevents a defendant, or those in privity with him, from taking advantage of their own delay. A party cannot obstruct the bringing or maintaining of an action and then avail himself of that obstruction.

VIII. Plaintiffs' fourth instruction, refused, should have been given. The ejectment suits brought in April, 1842, were in time, and were pending till the death of defendant. Before his death was suggested on the record in said suits, the present suit was brought, so that really there was no lapse of time at all from the termination of former suits and commencement of this. The courts have adopted the rule as stated in the instruction. (Ang. Lim., p. 344, 5 & 15; 5 Wend. 513; 10 Wend. 278; 3 Caine's Opinions of J. Thompson & Kent, pp. 202-7.)

IX. Plaintiffs' fifth instruction, refused, should have been given. (1 Ter. Laws, p. 543, § 2.) John McCourtney's deed to Martin was dated and acknowledged January 1, 1822, and not recorded within three months. The above statute declares void as against a subsequent deed.

X. Defendants' first instruction given was erroneous on the acts of the case before the court. Plaintiffs claim that the ejectment suit brought in 1842 was in time, and that that suit stopped the further running of the statute till the death of Martin McCourtney was suggested on the record, which was not till December, 1853. Before his death was suggested on the record, this suit was brought on to August, 1853.

As this suit was brought against the widow of Martin McCourtney even before his death was suggested on the record of

the other suit, there was no laches on the part of plaintiffs, and the statute ought to be no bar to plaintiffs, if the first suit brought in 1842 were in time. The instruction should have required twenty years' possession prior to the first suit brought in 1842.

The instruction was erroneous again in not noticing the nearly five years that plaintiffs were enjoined from prosecuting their ejectment by Martin McCourtney, to-wit., from April, 1847, to October, 1851.

This time of the continuance of the injunction ought not to be counted to defendants, and the instruction was erroneous in not excepting this period. (In § 6, art. 3, of act of limitations, of 1835, page 395; also, § 6, art. 3, of Laws of 1845, p. 713; also, last proviso of § 1 of limitation law of 1825, p. 511, of 2 vol.; 1 Maryland Chy. Dec., p. 182; 2 Stock. Chy. Rep., p. 347; 13 Vt. 288.)

Plaintiffs claim—1. That the time of the pending of the first ejectment suits—that is, from 11th July, 1842, to December, 1853—cannot be counted to defendants. If this position be right, then defendants' first instruction, and also their third instruction, were erroneous.

2. That, at any rate, the time from April, 1847, to October, 1851, that plaintiffs were restrained by injunction from prosecuting their actions at law, cannot be counted to defendants. Therefore, defendants' first instruction, and also fifth instruction, were erroneous and should not have been given.

The case was submitted for respondents upon a written brief prepared by *Truett Polk*, late Senator from this State in the United States Senate.

I. The court committed no error in excluding the record of the proceedings in insolvency.

II. The court was right in excluding from the jury so much of the chancery proceedings in the case of *Martin McCourtney v. Sloan and Krepps*, as it refused to allow to be read.

III. The opinion of the court was properly excluded. It

certainly could not have been offered on any other hypothesis than that it was a part of the record.

There was no error in excluding from the jury the judgment in favor of Jacobs v. John McCourtney.

IV. The plaintiffs' right of action accrued on the 30th of March, 1829, that being the date of the deed of Sheriff Simpson to Josiah Spalding. The statute of limitations applicable to the case, therefore, is that of 1825; (see Code of 1825, p. 511;) for the Code of 1845 provides that where the right of action had accrued at the time of the enactment of that Code it should be governed by the Code of 1835, and not by that of 1845. (See Code of 1845, p. 721, § 16.)

And the Code of 1835, where the cause of action had accrued at the time of that enactment, remits the party to the statute of 1825. (See Code of 1835, p. 396, § 11.)

But the provision of the statute of 1825, which allows plaintiffs who have commenced their suit within the time limited by the act, and who have become non pros., to commence another suit within one year after so becoming non pros., does not embrace action for or concerning real estate. (Code of 1825, p. 510, § 1, and p. 511, § 2 & 3.)

The court below, therefore, committed no error in refusing the third and fourth instructions prayed by plaintiffs, nor in giving the third and fifth instructions prayed by the defendants. These instructions are of the same tenor and upon the same point; they are therefore to be judged by the same rules.

On the trial of this cause, the defendants had the right to invoke and interpose, in bar of the plaintiffs' right to recover, the statute of limitations, the lapse of twenty years, without reference to any other suit, unless the statute itself allowed it.

We have seen that, by the act of 1825, the statute in regard to actions concerning real estate contains no such provision. The institution of a prior suit, therefore, could not prevent the statute from running against this one.

Moreover, the suits are not between the same parties. In the former suits, Sloan alone is plaintiff; but in this, the heirs

of Solomon G. Krepps are joined with him as co-plaintiffs. In one of the former suits, Martin McCartney alone is defendant, and in the other, Goodwin was defendant; and then, on his own motion, McCartney was admitted to defend. In this suit, however, James E. Bacon was sued as defendant, and Henry McCartney was admitted to come in to defend.

V. There can certainly be no reason for claiming that the institution of the suit in chancery, by Martin McCartney, under whom the defendants held possession, in order to protect his possession and to quiet his title against Sloan and the heirs of Krepps, is any reason why the statute of limitations should not run against the latter. If the circumstances called for it, their vigilance might protect them against the operation of the statute.

VI. But whatever may have been the effect of the actions of ejectment mentioned in plaintiffs' fourth and defendants' third instruction, if this suit had been brought by Thomas Sloan alone, without joining the heirs of Krepps with him, and even conceding that in such case these actions of ejectment would have protected him against the operation of the statute of limitations, yet they cannot save him from the effect of the statute in this case; for these actions were brought by Sloan alone, without being joined in them by Krepps or his heirs.

Martin McCartney's possession commenced on the 1st of January, 1822, that being the date of his deed from John. But this record shows that Solomon G. Krepps was in full life as late at least as the 28th of October, 1829, that being the date of the deed from Spalding to Krepps and Sloan, so that the statute of limitations continued, and did run against the heirs of Krepps. And, if the statute ran against the heirs of Krepps, this action being brought jointly with Sloan and the heirs of Krepps as co-plaintiffs, it runs against Sloan as well as the heirs of Krepps. All the plaintiffs are barred alike. (*Keeton's heirs v. Keeton's Adm'r*, 30 Mo. 544-5, and the authorities there cited by the court.)

VII. The first instruction given by the court on the prayer

of the defendants, is a correct exposition of the statute of limitations as applicable to this case. (Code 1825, p. 511, § 1 & 2; *Macklot v. Dubreuil*, 9 Mo. 486; *Biddle v. Mellon*, 13 Mo. 335; *Blair v. Smith*, 16 Mo. 273; *Joyal v. Rippey*, 19 Mo. 660.)

The instruction, indeed, adopts the language of the court in the case of *Macklot v. Dubreuil*, 9 Mo. 486.

VIII. The defendants' third instruction, in regard to the deed from John to Martin McCartney, is a correct declaration of the law governing the case. It is couched in the very words of the statute in force at the date of the deed against fraudulent conveyances. (1 Terr. Laws, p. 439, § 2.)

And this court has decided that where an instruction is given with reference to a particular statute, it is better that it should use the language of the statute. (*Jacobs v. McDonald*, 8 Mo. 565.) This the court below has done in the third instruction.

IX. The inferior court rightfully refused plaintiffs' first instruction; because, let it be conceded that the deed from John to Martin McCartney was fraudulent as against the creditors of the grantor, still the effect could only have been to render it void. It was exactly as if there had been no deed at all—no more. But the uninterrupted possession of the premises by the defendants, and those under whom they claim, for twenty consecutive years, claiming title for themselves against all the world, although they had no paper title, nor pretence of one, was a valid defence and title to them. Nay, such possession would even give a title that would prevail over the paper title. Of course such possession would give title, although the deed under which it was commenced was void. (*Biddle v. Mellon*, 13 Mo. 335; *Blair v. Smith*, 16 Mo. 273; *Joyal v. Rippey*, 19 Mo. 660.)

a. In *Keeton v. Keeton*, (20 Mo. 530,) the court held, even in a case in equity, that where an administrator, at a fraudulent sale made by him, became the purchaser of slaves belonging to the estate of his intestate and afterwards held them as his own, he was protected by the statute.

b. Even though John McCartney may have intended to defraud his creditors by making the deed to Martin, yet if Martin knew nothing of such fraudulent intent, he is not deprived of the benefit of the statute of limitations. (Gregg v. Sayre and wife, 8 Pet. 244.)

c. After the execution of the deed from John to Martin, the latter held the land conveyed by it adversely to John. (Macklot v. Dubreuil, 9 Mo. 477 ; Landis v. Perkins, 12 Mo. 238 ; Page v. Hill, 11 Mo. 149.) And as the plaintiffs in this case must stand in the shoes of John, the said Martin held adversely to them and those under whom they claim, and of course the statute of limitations would run in his favor.

d. But, at all events, the statute would begin to run against the creditors of John and all claiming under them, in favor of Martin and those claiming under him, from the date of the discovery of the fraud in the conveyance from John to Martin, dated January, 1822. And this discovery was made as early as the 10th of December, 1822; for, on that day, Jonathan Walton commenced his suit against John McCartney, and attached (as the plaintiffs claim) the same land that had been conveyed in January, 1822, by John to Martin, as still being the property of John, notwithstanding the said conveyance.

e. But the defendants asked another instruction upon this point, which the court gave. By this instruction, the possession of the defendant is not allowed to avail him until the date of the deed from the sheriff to Spalding; and this is certainly as much as plaintiffs had a right to claim.

BATES, Judge, delivered the opinion of the court.

John McCartney, by deed dated January 1st, 1822, conveyed a tract of land in St. Louis county, Missouri, to his son Martin McCartney, for the consideration of natural love and affection, and for the better maintenance, support, livelihood and preferment of Martin. This deed was recorded on the 24th day of April, 1822.

Subsequently suit was brought against John McCourtney on the 22d day of December, 1822, and this tract of land, attached as the property of John McCourtney on the 23d day of January, 1823, sold on the 25th March, 1829, to Josiah Spalding, and sheriff's deed to him executed on 30th March, 1829. Spalding conveyed to Thomas Sloan and Solomon G. Krepps on the 28th October, 1829.

On the 11th of April, 1842, Sloan brought two actions of ejectment for the land, one against Martin McCourtney and the other against Henry Goodwin, in which last case Martin McCourtney was, on his own motion, made a co-defendant. On the 4th day of February, 1847, Martin McCourtney and Goodwin filed a bill in chancery praying that Sloan might be enjoined from further prosecuting said actions of ejectment, and that the title of Sloan and Krepps to the land should be vested by a decree of the court in the complainant. A temporary injunction was granted, and afterward a decree was rendered by the Circuit Court in favor of the complainant perpetuating the injunction, from which the defendants appealed to the Supreme Court, where the decree of the Circuit Court was reversed and the complainant's bill dismissed at the October term, 1851. (The case is reported in 15 Mo. 95.)

Martin McCourtney died, and his death was suggested in the ejectment suits brought by Sloan, and the suits dismissed, on the ground that they did not survive against his representatives, on the 16th day of December, 1853.

On the 14th September, 1853, this suit was brought by Sloan and the heirs of Krepps for the same land, against Charles E. Bacon, (who held possession under Martin McCourtney,) and Ann McCourtney, the widow of Martin, has been made co-defendant. The petition sets out the title of the plaintiffs, and alleges that defendants hold under the deed of John McCourtney to Martin McCourtney, and charges that that deed was fraudulent and void as against the plaintiffs, who stood in the relation of creditors of John McCourtney. The answer puts in issue the sheriff's sale and conveyance to

Spalding, and Spalding's conveyance to Sloan and Krepps; and also denies that the conveyance by John to Martin McCourtney was without consideration and fraudulent and void, &c. The answer also set up, in bar of the plaintiffs' right, more than twenty years' possession before the commencement of the suit adverse to the plaintiffs and all other persons.

At the trial, evidence was given that, about 1821, John McCourtney owed debts which it was impossible to collect from him. Evidence was given of possession by Martin McCourtney and his representatives for more than twenty years before the commencement of this suit.

The plaintiffs asked the court to give to the jury the following five instructions, all of which were refused:

1. If Martin McCourtney obtained possession of the land in controversy under a deed which the jury shall consider fraudulent and void, (according to the rule laid down in other instructions,) then he cannot avail himself of the statute of limitations in virtue of a possession thus obtained, as against these plaintiffs claiming under a deed not tainted with fraud.

2. The deed from the sheriff (Simpson) to Josiah Spalding, given in evidence by the plaintiffs as the deed under which they claim the land in controversy, is a deed made by the sheriff under a judgment obtained by Jonathan Walton as one of the creditors of John McCourtney, and the deed thus made entitles the said Josiah Spalding, and all who claim under him, to all the protection which the law affords to creditors against the acts of their fraudulent debtors.

3. In estimating the time during which the statute of limitations would run against the plaintiffs the jury will not take into account the time during which the chancery suit, given in evidence, was pending between Martin McCourtney and Thomas Sloan and Krepps, their ancestors, of other plaintiffs in reference to said land.

4. If it appears from the evidence that the suit commenced by Thomas Sloan, one of the plaintiffs in this case, against Martin McCourtney, under whom defendants hold, the 11th day of April, 1842, was continued until the 16th December,

1853, and that the present suit for the same land was then commenced, defendants cannot protect themselves under the statute of limitations, unless they show that for twenty consecutive years prior to said 11th day of April, 1842, defendants, or those under whom they claim, had possession of said land adverse to plaintiffs and those under whom they claim.

5. If the deed from John McCourtney to Martin, under which defendants hold, was not recorded until three months from its date, then it is void as against the sheriff's deed to Spalding, under which plaintiffs claim, if said deed is subsequent to the other deed, and was recorded within three months from its date.

On motion of the plaintiffs, the court gave these four instructions:

1. If the jury believe from the evidence that, at the time of the execution of the deed of John McCourtney to his son Martin, the said John was in debt, it is a circumstance from which they may infer that the said deed to his son (being on the face of it a voluntary deed without consideration deemed valuable in law) was made with the intent to defraud, hinder or delay his creditors; and if made with such intent, the said deed is fraudulent and void as against creditors.

2. If both plaintiff and defendant claim title from the same man, to-wit., John McCourtney, and if the deed under which defendants hold is void as against the deed under which plaintiffs hold, then, so far as the documentary or paper title is concerned, plaintiffs must prevail against defendants.

3. If Martin McCourtney, under whom defendants claim, has, at any time since his possession of said land, asserted that he claimed to own said land by virtue of a deed from his father, John McCourtney, then these defendants cannot deny the title of plaintiffs, if said plaintiffs show a deed to them from said John McCourtney for same land, and which deed, by the rules laid down in the other instructions, is to prevail over said deed from John to his son Martin.

4. If Martin McCourtney, under whom defendants claim, got possession of the land in controversy by virtue of a deed

from John McCourtney to said Martin, dated 10th January, 1822, and plaintiffs claim by virtue of a deed dated March 20, 1829, from said John McCourtney to Josiah Spalding; and if the jury are of opinion, from the evidence, that the said deed from John to his son Martin is fraudulent and void as against the deed from John by sheriff to Spalding, then the defendants cannot avail themselves of the possession so obtained under the plea of the statute of limitations, until the date of the execution of said deed of 1829.

On motion of defendants, the court gave the following five instructions, to-wit:

1. If the jury find from the evidence that the defendants, and those under whom they claim, have had possession of the premises sued for twenty years consecutively next before the commencement of this suit, holding the same for themselves and against all other persons, the plaintiffs are not entitled to recover.

2. Unless the jury shall find from the evidence that the land attached, in the case against John McCourtney, in the St. Louis Circuit Court, is the same land described in the plaintiffs' amended petition, the plaintiffs cannot recover in this action.

3. The institution of the suits of Mrs. Sloan against Henry Goodwin, and of Mrs. Sloan against Martin McCourtney, the records of which have been given in evidence by the plaintiffs, did not save the running of the statute of limitations against these plaintiffs.

4. If the jury find from the evidence that the deed from John McCourtney and wife was executed and delivered by them to Martin McCourtney at the time it bears date, then the plaintiffs are not entitled to recover in this action, unless they shall have satisfied the jury by the evidence in this case, that said deed was made by malice, fraud, or in collusion, or guile, to the intent, or for the purpose of hindering, delaying or defrauding the creditors of the said John of their lawful claims.

5. The institution or the prosecution of suit in chancery

by Martin McCourtney against Thomas Sloan and Solomon G. Krepps, the record of which has been given in evidence by the plaintiffs in this case, did not prevent or save the running of the statute of limitations against the said plaintiffs in this suit.

The plaintiffs took a non-suit, with leave to move to set it aside; which motion having been overruled, they appealed to this court.

The right of action of the plaintiffs, or those under whom they derive title, occurred on the 30th day of March, 1829. More than twenty years had elapsed from that time to the commencement of this suit, and there being evidence tending to prove an adverse possession by defendants, or those under whom they derive title, during all that time, it rested upon the plaintiffs to show the reasons why that possession was not an effectual bar to the plaintiffs' action.

They propose several different reasons, which will be considered in the same order in which they were proposed.

1. They insist that, as Martin McCourtney entered into possession under a fraudulent deed, he cannot avail himself of the statute of limitations. This view is supported by a number of decisions in other courts; but this court has heretofore given so great an effect to twenty years' possession, uninterrupted and adverse to all the world, (subject to the exceptions mentioned in the statute,) that now it can scarcely be permitted to impair the effect of such a possession by an objection, however meritorious, to its origin. The question is not whether a fraudulent conveyance can be made valid by lapse of time, but whether (an adverse possession being shown) the court will permit any inquiry into the manner of its beginning.

So regarding that subject, the first instruction prayed by the plaintiffs was properly refused.

2. They insisted that the time during which the chancery suit of Martin McCourtney against Sloan and Krepps was pending should not be counted against the plaintiffs, and

3. That the statute ceased to run against them from the

time that Sloan commenced his two actions of ejectment, that is, the 11th April, 1842.

These two reasons may be considered together, and without determining what would have been the consequences if both Sloan and Krepps had been, by the proceeding in chancery, enjoined from prosecuting their claims, or if they had both been plaintiffs in the actions of ejectment, it suffices that as Sloan alone was the plaintiff in the ejectments, and Sloan alone was enjoined by the proceeding in chancery, he alone can derive any advantage from them, or be protected in any right by them. Krepps and his heirs cannot avoid the bar of the statute of limitations by reason of the disabilities of his co-tenant Sloan; and as this action is brought jointly by Sloan and the heirs of Krepps, they cannot avail themselves of the privileges which belong only to one of them. (*Keeton v. Keeton*, 20 Mo. 544.) Therefore, the third and fourth instructions refused the plaintiffs were properly refused, and the third and fifth instructions given for the defendants were properly given.

The first instruction given for the defendants states the general principle correctly, and though the exceptions to the principle are numerous there do not appear to have been any in this case which should have been stated to the jury.

Having thus disposed of the instructions having reference to the defence of the statute of limitations, it is necessary to examine all the others, the giving or refusal of which is assigned for error. The second and fourth, given on motion of the defendants, are in accordance with the plaintiffs' own view of the case, and contain no error.

The second instruction prayed by the plaintiffs and refused, might well have been given, but its refusal is not such an error as will authorize a reversal of the judgment; the matter of it was not disputed by the defendants, and was in effect given to the jury by the other instructions, particularly the second, given for the plaintiffs.

The fifth instruction asked by the plaintiffs and refused, was inapplicable to the case stated in the petition, which

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charged that the deed of John McCourtney to Martin was void for fraud, but did not assail it because it was not recorded within three months from its date.

The plaintiffs offered in evidence several records, which, on motion of the defendants, were excluded by the court. If they had all been given in evidence, the condition of the case before the jury would not have been materially changed, and, as upon the principles governing the case the judgment below should be affirmed, it is unnecessary to examine into the propriety of the exclusion of that testimony.

Judgment affirmed. Judges Bay and Dryden concur.

NOTE.—It will be observed that the amended petition in this case has the aspect of an ejectment, or writ of right, setting out the title, and partially of a bill in equity. While the petition alleges that the deed under which the defendants claim was made in fraud of creditors, and therefore void, they pray no relief against it whatever, but simply ask for possession of the land and damages for the detention thereof, so that it is really an ejectment only. The present suit was commenced in 1851, when the act of March 12, 1849, (Acts 1849, p. 51; continued in the ejectment act of 1855, § 10,) was in force, which provides that in an ejectment where there are two or more plaintiffs, they may recover in the same manner as if they had brought separate action, &c., and that it shall be no objection to a recovery that one or more do not prove any interest in the premises, &c. *Query*: Does it make any difference that one of the plaintiffs, being under disability, may recover by avoiding the bar of the statute, while the other cannot? or, in other words, is the statute confined to the case of *failure of proof* upon the part of the plaintiff; or does it protect the title which remains good because no valid defence is shown, the defence being apparent only?

In Keeton v. Keeton, cited, the judgment was reversed and the case remanded, so that the plaintiff might amend, and thus the party under disability be saved the consequences of the suing jointly with a party barred by statute.—*REP.*

SHELDEN TOMLINSON *et al.*, Respondents, v. CHARLES J. LYNCH
et al., Appellants.

Possession, adverse.—The possession by a defendant, who has, by deeds and partitions, acknowledged the title of the plaintiff, cannot be considered adverse to such title.

Pleading.—An answer in ejectment which does not deny, admits the possession.

Witness.—The wife of one of the defendants is not a competent witness for the other defendants who have joined in the defence.

Appeal from St. Louis Land Court.

This is an action of ejectment, brought 28th January, 1860, by plaintiffs against defendants, to recover possession of two lots in Labadie's addition to the city of St. Louis.

The petition alleges that, on the 1st September, 1859, the plaintiffs were entitled to the possession of said premises; and that, being so entitled, the defendants afterwards, on the same day, entered into such premises, and unlawfully withhold possession thereof from plaintiffs, to their damage, in the sum of five hundred dollars; and alleges the monthly value of the rents at fifty dollars, and prays judgment for possession, damages, &c.

The defendants answered jointly, denying plaintiffs' right to possession; the *unlawful* entry of defendants; the unlawful withholding of possession, and the monthly value of the rents, as alleged.

They further allege that defendant, Salina Lynch, has had the quiet, peaceable and undisturbed possession of said lots of ground, and every part thereof, claiming title to the same, which possession has been adverse to all the world, and has continued uninterruptedly for more than ten years next before the commencement of this suit, and set up said possession as a bar.

On the trial, a mass of documentary evidence was introduced clearly establishing a legal paper title in the plaintiffs at and before the date of the alleged entry to an undivided four fifths of said lots.

It appeared in evidence that the defendant, Salina Lynch, was the widow, and Charles J. Lynch, George W. Lynch, and Henry C. Lynch, were the children of one James Lynch, who died prior to the year 1847, claiming an interest in said property; and that certain parties claiming to be the heirs at law of Sylvester Labadie also claimed an interest in the same; that, in the year 1847, after the death of James Lynch, his widow, and all his children, conveyed, by deed, to Louis Bogy, (who married one of the Labadie heirs,) an undivided

three fourths of certain property, embracing the property in dispute, and at the same time the Labadie heirs executed to George W. and Charles J. Lynch a deed for the undivided one fourth of the same.

These deeds were made by way of compromise between the two families of Lynch and Labadie.

Afterwards, on the 15th July, 1848, all the members of both families executed a deed of partition, by which the Labadie heirs conveyed to George and Charles Lynch the lots in dispute, and Salina Lynch and the Lynch heirs conveyed to Bogy certain other lots.

This deed recites that Salina Lynch and the other Lynches named therein, were the owners of one fourth (undivided) of the property named in said deed, and that the other parties named therein were the owners of the other three fourths; and that the conveyance of the Lynch interest to George and Charles was made at the request of all the Lynches; and that the conveyance of the Labadie interest to Bogy was done at the request of all the representatives of Labadie. This deed is executed by all parties.

It was proven by Bogy that this was done in pursuance of a family arrangement for the settlement of the title.

On the 31st of October, 1853, George and Charles conveyed an undivided one fifth of said lots to Henry C. Lynch.

In January, 1854, George and Charles conveyed an undivided one fifth of same to their sister Emma.

On the 21st February, 1853, they conveyed an undivided one fifth to George Knapp, trustee, in trust for Frederick J. Lynch, (a brother,) his wife and heirs.

There were five children of James Lynch—four sons and a daughter,—and thus by these conveyances the property was apportioned so that each had one fifth in fee, or in trust.

On the 3d April, 1854, Charles conveyed all his interest to Henry.

On the 4th September, 1854, George, Henry, and Emma, representing four fifths (undivided) of the title, conveyed the same to trustees to secure debts.

A sale was had under this deed of trust, and the property bought by Tandy, to whom a deed was executed by the trustees; and on the 21st of January, 1859, Tandy conveyed to plaintiffs.

On the 19th of February, 1858, George Knapp, as trustee, joined with the beneficiaries in the deed of 21st February, 1853, in bringing, in the Land Court, a suit for partition, making all the Lynches defendants, and claiming an interest of one fifth (undivided) in the property, subject to the trusts. In this petition the rights and claims of the respective parties are set out with particularity.

The answer of Salina and others admits the title and interest set up by Knapp and others, under said deed; and the defendants set up no ground of defence, except that they are entitled to be indemnified, out of said one fifth interest, for the payment of certain encumbrances which they allege existed on the property and were paid by them.

Pending this partition suit, the plaintiffs acquired their title to the four fifths' interest, and on the 12th day of November, 1859, were admitted as parties upon the record, and filed an answer in the cause setting up their title and interest.

Afterwards, on the 27th of March, 1860, the partition suit being about to come to a hearing, and the Lynches desiring a continuance, as a condition to the consent of plaintiffs in said suit to the granting of a continuance, executed, under seal, a paper whereby they consented and agreed that, at the next, or any subsequent term of said court, they would withdraw their answer in said cause. By said agreement they expressly waived all matters of defence and relief set up in said answer, and consented and agreed that the facts stated in said petition should all be taken as true; and that at the next, or any subsequent term of said court, a decree might be entered according to the prayer of the petition.

On the 21st of January, 1859, George and Henry Lynch made affidavit that Tandy's title to four fifths of the property was clear and undisputed. This affidavit was objected to as

evidence by defendant Salina Lynch. The objection was overruled and she excepted.

Defendant, Salina Lynch, then offered Mrs. George W. Lynch as a witness for Mrs. Salina Lynch, it being admitted that she was the wife of George W. Lynch, one of the defendants. Plaintiffs objected to her competency, because she was the wife of one of the defendants. Defendants' counsel then stated that he would withdraw the answer of George W. Lynch and Charles J. Lynch, with leave of court, for the purpose of qualifying the said Mrs. George W. Lynch and said George W. Lynch, and said Charles J. Lynch to testify in behalf of said Salina Lynch.

There was evidence upon the question of possession.

The following instructions were given for the plaintiffs, the defendants excepting:

1. In order to enable the defendant, Salina Lynch, to succeed in her plea of possession for ten years, she must prove to the satisfaction of the jury that she, and those under whom she claims, have had possession of the property in controversy ten years before the institution of this suit; and they must also believe from the evidence that such possession was an actual, continued, visible, notorious, distinct, exclusive, and unbroken possession in said Salina and those under whom she claims; and unless the jury believe from the evidence that such a possession did exist for ten years before the institution of this suit, they must find, as to this issue, for the plaintiffs.

2. If the jury find for the plaintiffs, they should find the quantity of interest in the land which the plaintiffs are entitled to recover; also, the amount of plaintiffs' damages for the rents and profits of said lots from the commencement of this suit to the time of trial; and they should also find the monthly value of the rents of the portion of the property which they find the plaintiffs entitled to recover.

3. If the jury believe that the various deeds read in evidence by the plaintiffs are genuine deeds, and that they describe the property mentioned in the plaintiffs' petition; and that defendant Finnegan, at the time of the commencement of this suit

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was in possession of any part of said premises as tenant of said other defendants, or either of them; and that said deeds so read in evidence by the plaintiffs were executed at or near about the time they bear date; and that either the said George W. Lynch, Henry C. Lynch, or Charles J. Lynch, at any time within ten years of the commencement of this suit was in the actual possession of said property sued for by himself or tenants claiming the same, then the jury should find for the plaintiffs against all the defendants.

4. If the jury believe from the evidence that the defendants Charles J. Lynch, Henry C. Lynch, and George W. Lynch, are the sons of defendant Salina Lynch, and that they and defendant Salina executed the deed read in evidence, dated 15th July, 1848, and that the property described in the petition is a part of the property described in said deed as being conveyed to George W. Lynch and Charles J. Lynch, and that said Salina has, since the date of said deed, occupied and enjoyed the possession of said property by the consent and permission of her said sons, or either of them, then the possession of said Salina is not adverse to said George, Charles and Henry, but her possession is in submission to the title of said George and Charles, and their grantees; and if the jury further believe that the other deeds read in evidence by the plaintiffs are genuine deeds, and describe the property sued for, and that said Finnegan, at the time of bringing this suit, was in possession under said other defendants, or either of them, they should find for plaintiffs against all of the defendants.

5. The jury is instructed that the burden of proving the facts necessary to constitute a defence under the statute of limitations devolves upon the defendants, and that in the absence of such proof the law presumes the possession of land to be in the true owner, or under and in submission to the title and claim of the true owner; and if the jury believe from the evidence that the deeds read in evidence by the plaintiffs are genuine deeds, they should find for the plaintiffs, unless they believe that the defendants have proven the facts

necessary to establish their defence under the statute of limitations.

6. The jury is instructed that the defendants, by their answer, admit that they were in possession of the property sued for at the time mentioned in the petition.

Defendants' instructions, given :

1. The jury are instructed that any statements or acknowledgments made by any of the defendants, except Salina Lynch, will not bind or affect her interest in the property mentioned in plaintiffs' petition, unless she was present, or assented to such statements or acknowledgments ; and that in considering this case such statements and acknowledgments will only be taken as evidence against the parties making them or assenting thereto.

2. The jury are instructed that by adverse possession of land, is meant a peaceable and uninterrupted possession, claiming to hold the land as the owner thereof against all other persons—not recognizing or admitting the claim of any other person as the owner thereof.

3. If the jury believe from the evidence that Salina Lynch, one of the defendants in this suit, has had possession of the lots in plaintiffs' petition mentioned, claiming them as her own, and receiving the rents of the buildings upon them, for ten years next preceding the commencement of this suit, and that such possession has been adverse to the plaintiffs and those under whom they claim, then the plaintiffs are not entitled to recover in this action, and the jury will find for the defendants.

Defendants instructions, refused :

1. If the jury believe from the evidence that the lots in plaintiffs' petition mentioned were held and claimed by James C. Lynch prior to his death, and that he had actual possession of them under a claim of title, and that such possession was continued to the time of his death, and that it was adverse to all the parties claiming any interest in said lots ; and if they further believe from the evidence that the said defendant, Salina Lynch, was the wife of said James

C. Lynch, and that ever since his death she has claimed and held actual possession of said lots of land, either as her own in fee simple, or by virtue of her marriage to said James C. Lynch, and as his widow, and as her dower in his estate; and that such claim of dower interest in said lots was assented to by the heirs of said James C. Lynch within a short time after the death of said James C. Lynch; or that, by virtue of any arrangement or understanding between said Salina and the heirs of said James C. Lynch, certain lots of land, including the lots sued for in this action, were allotted to said Salina Lynch as and for her interest in the estate of said James C. Lynch, and the said Salina has had possession of said lots under said arrangement as her own, and has held possession thereof for more than ten years prior to the commencement of this suit as her own property, then the plaintiffs are not entitled to recover in this action, and they will find for the defendants.

2. The jury are instructed that the plaintiffs claim title under Dr. David C. Tandy, who claims under a deed of Lewis and Sanders, as trustees, under a deed of trust executed by some of the defendants. It devolves upon the plaintiffs to prove that one or more of the notes mentioned in said deed of trust was due and unpaid at the time of the sale under said deed of trust, and unless the jury believe from the evidence that such was the fact, they will find for the defendants.

3. If the jury believe from the evidence that the plaintiffs purchased the lots in controversy, and received a conveyance thereof from David C. Tandy, at the instance and request of the defendants, or either of them, upon an arrangement that they would advance for such purchase the amount of money to pay for said lands; and that the plaintiffs at the same time entered into an arrangement or agreement, in writing, with defendants, or either of them, to hold said property as a security for such advance, and to reconvey to said defendants, or either of them, upon being repaid such advance and interest thereon, then the deed to plaintiffs is in the nature of a mortgage, and the plaintiffs are not entitled to recover pos-

session of said lands in this action, nor until the equity of redemption in said defendants or defendant has been foreclosed by the proper proceeding, of which there is no evidence in the case.

4. The jury are instructed that, to entitle the plaintiffs to recover in this action, they must prove to the satisfaction of the jury that they were entitled to the possession of the lots of land in the plaintiffs' petition mentioned, or some portion thereof, at the date of the commencement of this suit, and that no other person or persons were entitled to the possession of the same; and if the jury believe from the evidence that the defendant, Salina Lynch, had had undisputed possession of said lots as the owner thereof for ten years prior to the commencement of this suit, then the plaintiffs are not entitled to recover.

The jury found for the plaintiffs for four fifths (undivided) of the property, and assessed plaintiffs' damages at \$50; and found the monthly value of the rents of four fifths at \$14, and entered judgment thereon.

A motion for a new trial was made by defendants and overruled, to which the defendants excepted, and the case is brought here by appeal.

George P. Strong, for appellants.

I. There was no proof that George, Henry, or Emma Lynch were in possession of the premises. Their answer does not admit the possession.

II. The instruction in relation to the possession of Salina Lynch was erroneous; that if she took possession of the premises with the consent of George and Charles Lynch, her possession would not be adverse to them, would make the possession of every grantee the possession of the grantor. If by the consent, or otherwise, of the children she took possession, and continuously held them, claiming them as her own, and admitting the claim of no other party, such possession was adverse to her children and all others.

III. The court should have given the instructions asked by

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Salina Lynch. (R. C. 1855, p. 1045; Draper v. Schoot, 25 Mo. 197; Warfield v. Lindell, 30 Mo. 272.)

IV. The court erred in admitting the statement and affidavit of George and Henry Lynch to be read in evidence. The instruction that the evidence did not affect Mrs. Lynch does not cure the error.

Currier, with *W. N. Grover*, for respondents.

I. The statement of George and Henry Lynch was good as against them. It was not offered as evidence against Salina Lynch.

II. George Lynch and his wife were incompetent witnesses. The answer of all the defendants was joint. (Garnier v. Le-Beau, 30 Mo. 229; Schaeffer v. Kahlman, 25 Mo. 232; Benoist v. Sylvester, 26 Mo. 589; R. C. 1855, p. 1578.)

III. The answer admitted possession. It did not deny the entry of defendants, and set up a bar of ten years' possession by Salina Lynch. (R. C. 1855, p. 1232, § 12, and 1238, § 48; Sappington v. Jeffries, 15 Mo. 628; Engler v. Bate, 19 Mo. 543.)

BATES, Judge, delivered the opinion of the court.

This is an action of ejectment. The plaintiffs showed legal paper title to the premises; and the defendant, Salina Lynch, claimed to have had ten years' possession, such as to bar the plaintiffs by the statute of limitations. The action was begun on the 28th of January, 1860. The only important question in the case is the inquiry whether Mrs. Salina Lynch's possession was *adverse* to the right of the plaintiffs. Her deed, made in 1848, and her participation in the partition suit began in 1858, demonstrate that she acknowledged the title which the plaintiffs have to be good; and her possession therefore is not in denial of or adverse to it.

The answer by not denying, admitted the possession of all the defendants upon the premises, and therefore the judgment was properly rendered against all of them. The tes-

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timony of the wife of George W. Lynch, one of the defendants, was properly excluded, because her husband was a party defendant, jointly liable with the other defendants, and the offer to withdraw the answer of her husband had no effect, as it was not carried out by an actual withdrawal.

Judgment affirmed. Judges Bay and Dryden concur.



WILLIAM A. KOBBE, Respondent, v. WILLIAM LANDECKER *et al.*, Appellants.

Witness—Assignor.—The payee and assignor of a promissory note is not a competent witness for the maker to prove a defence that avoids the note. (R. C. 1855, p. 1577, § 6, s. d. 2.)

Appeal from St. Louis Court of Common Pleas.

Krum & Harding, for appellants.

The deposition of Joseph Lessler should have been admitted. The ground of his exclusion was that he was the assignor of a chose in action called to testify as to facts in relation thereto which occurred prior to his assignment. But it is contended that the endorser of a negotiable promissory note is not the assignor of a chose in action within the contemplation of our statute concerning witnesses. (*Hicks v. Wirth*, 10 How. Prac. R. 355, where the question is fully discussed; How. N. Y. Code, 597, § 399.)

John A. Goodlett, for respondent.

I. The notes are made payable at St. Louis, and are therefore, by the statute of the State, *non-negotiable*.

II. By the statute, (R. C. 1855, p. 1577, § 6,) the assignor of the note was not a competent witness.

DRYDEN, Judge, delivered the opinion of the court.

This is a suit against Landecker *et al.*, the makers of two promissory notes, payable to Lessler & Joseph, and by them

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assigned to the plaintiff. The defendants, by their answer, admit the assignment of the notes to the plaintiff by Lessler & Joseph; but, by way of destroying the operation of the same, charge that the payees made the assignments as collateral security for certain large sums of money lent and advanced to them by the plaintiff at the time of the assignments, in the State of New York, upon a contract then and there made, which, by the laws of New York, was usurious and void.

On the trial of the case in the court below, the defendant, in support of the defence set up in the answer, offered to read the deposition of Lessler, one of the assignors; but the court, upon the objection of the plaintiff, refused permission to read it, and a verdict and judgment were rendered for the plaintiff, from which the defendants have appealed to this court.

The question presented in the case is as to the competency of the witness Lessler, who is the assignor of the notes sued on. For some purposes—and it may be for some parties—an assignor is a competent witness, but for others he is not. What are the precise limitations and extent of his competency is not always easily determined, depending as it does upon the nature of the facts to which he is called to testify—the time when they transpired, and, it may be, upon the question, by whom he is called.

The second subdivision of the sixth section of the act concerning witnesses, (R. C. 1855, p. 1577,) governing the case under consideration, makes this provision touching the competency of certain persons to testify, viz:

“§ 6. The following persons shall be incompetent to testify,” &c. “Second, any assignor of an account, judgment, or thing in action, concerning facts occurring anterior to the assignment; nor shall any grantor, vendor or assignor in any deed, *instrument* or *writing*, affecting property, real, personal or mixed, or any claim or right therein or therefrom, be a competent witness to alter, change or qualify the proper effect and operation of the words and terms of such deed, instrument or writing.”

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The rejected deposition is the deposition of an assignor in an instrument or writing called an assignment which affects personal property, viz., a promissory note, and the evidence contained in the deposition tends to change or qualify the proper effect and operation of the words of the assignment by showing that they do not, according to their natural import, convey the title of the notes to the plaintiff, but fail to accomplish that result. The assignor is incompetent for this purpose. His evidence is in the teeth of the statute, and was therefore properly rejected by the court.

Our opinion does not rest upon the first clause of the subdivision cited, which excludes assignors called to testify to facts occurring anterior to the assignment. This branch of the section could not exclude the witness, because the facts about which he testifies are coeval with, not anterior to, the assignment; but we think there can be no room to doubt he comes within the exclusion of the second clause.

Let the judgment of the Common Pleas be affirmed; the other judges concurring.



ISAAC H. TAYLOR'S HEIRS, Appellants, v. RICHARD S. ELLIOTT
et al., Respondents.

Mortgagee—Estoppel.—Where the party beneficially interested in lands sold under a deed of trust to secure a debt, the sale of which was voidable because the lands were put up in a lump, subsequently induces a third party to purchase the lands from the vendee at the trustee's sale, he cannot afterward be allowed to attack the validity of the sale.

Appeal from St. Louis Land Court.

The facts are stated in the opinion.

M. L. Gray, with *Krum*, for appellants.

I. Both sales by the trustee were void. 1. The first sale was void because the different tracts were put up and sold in

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one parcel, when they should have been sold separately. Had it been a sheriff's sale it would have been set aside. (7 Mo. 346; Conway v. Nolte, 11 Mo. 74.) 2. The second sale was clearly void.

a. The purchaser at the first sale, Brown, was not allowed to complete his bid and pay the money.

b. The trustee had no right to call for the money until he was ready to deliver the purchaser, Brown, a good and sufficient deed, properly executed and acknowledged, and until Brown had a reasonable time to examine the deed and judge of its sufficiency. Brown's saying he had not the money was no refusal. (Conway v. Nolte, 11 Mo. 74.)

II. The agreement between Newbury and Brown after the sale to Hickman does not take away the plaintiff's right to redeem.

This suit was brought before the agreement was made, and if Taylor were a party to the agreement he has not released his claim. Newbury bought with notice by *lis pendens*. There was no stipulation about the suit.

S. N. Holliday, for respondent.

I. The judgment was for the right party and should be affirmed.

Brown bid in the property for Taylor & Mason for the purpose of defeating a sale that day, so that a further notice might be required.

II. The plaintiff induced Newbury to buy the property of Hickman, and cannot attack that sale under which Newbury bought.

BATES, Judge, delivered the opinion of the court.

This suit was brought by Taylor against Elliott & Hickman to set aside a sale made by Elliott, as trustee to Hickman. Louis S. Robbins made a deed of trust to Elliott to secure the payment of several promissory notes, payable at different times. The land conveyed was four different parcels of land in the town of Lowell, situate in four different

blocks, and each parcel of land was composed of eight lots. When the last note became due Hickman was the holder of it, and Elliott, the trustee, at his request sold the property as directed in the deed of trust. Taylor had before then purchased the property from Robbins, subject to the deed of trust. At the trustee's sale the property was bid for by G. W. Brown, and struck off to him for the sum of three thousand two hundred and fifteen dollars, and about one hour afterward the trustee offered to convey the property to Brown, exhibiting to him a deed signed but not acknowledged, and demanded the sum of money bid for the property. Brown failed to pay the money because he did not have it. He bought the property for Taylor & Mason, and expected Mr. Mason to furnish the money, and he had not done so. He understood Mr. Mason to be concerned in the ownership of the property, but what was his precise interest in the property does not appear in the case. Brown having failed to pay the money, the trustee returned to the place of sale and again put up the property for sale, and it was then sold to Hickman for one thousand dollars, and a deed made to Hickman by the trustee. At each sale the whole property was put up at one time, without being divided. The property was worth about ten thousand dollars, but at the first sale one Dr. Hall made proclamation that he had a claim against the property, which tended to injure the sale.

Afterward, and after this suit was brought, Brown, as the agent of Taylor & Mason, made an agreement with Newbury, whereby Newbury bought the property from Hickman, together with the note, (which was not fully satisfied by the sale to Hickman,) for three thousand dollars, and contracted to sell the same to Brown for thirty-five hundred dollars, payable in two equal instalments; with the proviso, that, if one of the instalments was paid and the second was not, Newbury should be no longer bound to convey to Brown, and should repay to him the first instalment.

Brown also made a conveyance to Newbury. Taylor then

informed his counsel that the case was settled. Brown paid to Newbury the first instalment, but failed to pay the second, and Newbury repaid him the first instalment. Taylor then continued the prosecution of this suit, and Newbury, upon his own motion, was made a co-defendant and filed an answer.

The case was tried by the court below and judgment given for the defendant—the only declaration of law by the court being, that, "Upon the whole case, as made by the evidence, the plaintiff is not entitled to the relief sought by his bill." As the case is shown by the testimony, the sale made by the trustee appears to have been conducted improperly. It was the trustee's duty to endeavor to make the property bring its full value. His discretion in that matter is to be trusted, however, very largely. We know of no rule which absolutely requires that property to be sold by a trustee should be divided into lots of reasonable size, yet it is evident that in many cases he would be required to do so in accordance with the general principle which must rule his conduct. In this case, there being four distinct pieces of land, and each piece apparently capable of division, and no reason being shown why they should all be sold in a lump, we are inclined to the opinion that the trustee did wrong in so selling them. But the conduct of Taylor subsequent to the sale, by which Newbury was induced to buy the land, and thus became the party really interested in sustaining the validity of the sale, forbids that the sale should now be disturbed at Taylor's instance.

We give no positive opinion as to the propriety of the trustee's conduct in selling the whole property in a lump; nor, if improper, do we give any decision as to whether that impropriety would authorize the annulment of the sale, or only render the trustee liable in damages to the person injured thereby.

Judgment affirmed. Judges Bay and Dryden concur.

Slevin, Trustee, v. Brown.

BERNARD SLEVIN, Trustee, &c., Plaintiff in Error, v. JOHN BROWN, Defendant in Error.

Ejectment—Judgment, bar of.—A judgment in an action of ejectment is no bar to the prosecution of another suit for the recovery of the same premises. The provision of R. C. 1855, p. 695, § 33, was repealed by act of November 21, 1857. (Acts 1857, p. 34.)

Uses, statute of.—The statute of uses does not apply to chattels real. (R. C. 1855, p. 354, § 1.)

Wife's Estate.—Where the legal title in a leasehold estate in lands was vested in a trustee for the benefit of the wife, the death of the wife will not prevent the trustee from recovering the possession of the property in ejectment. The legal title remains in the trustee.

Appeal from St. Louis Land Court.

This is an action, in the nature of an action of ejectment, to recover the possession of a lot of land in block 145, in the city of St. Louis, commenced in the St. Louis Land Court, on the 22d day of September, 1858.

The defendant in his answer denies the allegations in the petition, which, of course, puts the plaintiff on proof of his right to recover. The cause was tried by the court below without a jury.

The defendant admitted that he was in the possession of the premises in controversy at the time of the commencement of this suit, and that he was then, and had been, in the possession thereof ever since the 6th of September, 1858.

Both parties claim under a lease from John Biddle to Anthony Tiernan, dated October 1, 1852, for the term of nine years and nine months, renewable for the term of ten years longer after the expiration thereof.

On the 22d of January, 1853, Anthony Tiernan, for value received, assigned the lease to Bernard Slevin, the plaintiff in this suit, in trust for his (Tiernan's) wife, Catharine Tiernan, for her use and benefit during the term. (See opinion.)

Both the lease and the assignment were properly acknowledged and recorded November 26, 1853.

During the fall of 1854, Anthony Tiernan became indebted

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to one Thomas Burke for the sum of eighty-five dollars and sixty-one cents, for which Burke obtained judgment against Tiernan, on the 29th of August, 1855, before a justice of the peace of St. Louis county. The justice issued an execution on the judgment, which was returned *nulla bona* by the constable, on the 22d of October, 1855. A transcript of the judgment of the justice was, on the 30th of November, 1855, filed with the clerk of the St. Louis Land Court, who issued an execution thereon to the sheriff of St. Louis county, dated November 30, 1855. The sheriff, on the 4th day of February, 1856, sold the premises in controversy, as the property of Anthony Tiernan, under the execution issued to him by the clerk of the Land Court, and the defendant, John Brown, bought the land at the sale, and received a deed from the sheriff therefor. The title, therefore, of the defendant is under the sheriff's sale of the lease in 1856, for a debt of Tiernan's, which originated in the fall of 1854; and the title of the plaintiff is acquired by an assignment of the same lease, dated in the beginning of the year 1853, and recorded in the same year.

On trial, the plaintiff gave evidence tending to show that Slevin held possession of the premises as the trustee of Mrs. Tiernan, by virtue of the assignment of the lease in 1853, until September, 1858, when he was turned out of possession by the sheriff, under a writ of possession in favor of John Brown, against the tenants of Slevin; but Slevin was no party to the suit. The plaintiff read the lease and assignment in evidence.

Testimony was also introduced by the defendant by which he attempted to show that Tiernan was insolvent from 1852 to 1856, at the time of the assignment of the lease, and at the time of the sheriff's sale. The defendant also attempted to show that the plaintiff knew of the suit against his tenants; but nothing was offered to show that the plaintiff was a party to the suit.

The defendant then read in evidence the record and proceedings of the St. Louis Land Court, in the suit before mentioned,

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which was brought by John Brown against Anthony Tiernan, James Score, and Mary Cotton, the tenants of Slevin, the plaintiff in this suit; and the plaintiff at the time objected to the reading of the record and proceedings, on the ground of the evidence being incompetent and irrelevant.

For instructions see opinion.

Casselberry, for plaintiff in error.

I. The first point presented in this case is as to the effect and admissibility of the record in the suit in the St. Louis Land Court brought by John Brown against Anthony Tiernan, James Score, and Mary Cotton, the tenants of Bernard Slevin.

As Mr. Slevin was no party to the suit against his tenants, he is not bound thereby; nor is the record evidence in this case for any purpose whatever; and for this reason the court below erred in admitting the record in evidence, and in giving the instruction that the judgment in that case is a bar to the action of the plaintiff in this case.

It is certainly a plain elementary rule of law that no one is bound by a legal proceeding to which he is no party.

A judgment against a person who had no notice of the pendency of the suit in which it was rendered, or who is no party to it, is absolutely void. (*Bascom v. Young*, 7 Mo. 1; *Smith v. Ross*, 7 Mo. 463; *Anderson v. Brown*, 9 Mo. 646.)

II. But, even if Slevin had been a party to the suit, it was a mere action of ejectment and would not bar another action of ejectment; that is to say, one action of ejectment is no bar to another action of ejectment between even the same parties. (*Adams on Eject.*, 4 ed., top page 420.) At one time this principle was doubted, but we have now at least the following tacit recognition of the rule by the Legislature, that is to say, the Revised Statutes of 1855, (vol. 1, p. 695, § 33, tit. Ejectment,) provide that a judgment in ejectment shall be a bar to any other action of ejectment between the same parties as to the same subject matter; and the act of November 21, 1857, (p. 34, adjourned session,) repealed the 33d section of the act of 1855. By these two acts of the Legislature, we

have the views of the legislative department on the subject, as well as judicial authority. The action, therefore, of the court below in admitting the record, and in giving the instruction that the plaintiff is barred thereby, is a plain, glaring, blunt error; and for this reason alone, if there were no other, this cause ought to be reversed and remanded.

III. The proceedings of John Brown against Slevin's tenants being void as to Slevin, as he was no party thereto, did not, in any manner, give Brown any more or greater right or title to the premises than he had before the commencement of the proceedings; and if he had no title at all, he was a mere trespasser. When the sheriff delivered possession, the plaintiff acted on his own peril. (Adams on Eject., 4 ed., pp. 342, 389, 391.) As Slevin was in the peaceable, quiet possession of the premises, he was, even without showing any title papers, entitled to recover against Brown, who had no title, and who was a mere trespasser or intruder. (Crocket v. Morrison, 11 Mo. 1.)

IV. The second instruction says that "whatever might have been the effect of the assignment made by Anthony Tiernan to Bernard Slevin of the lease in question, while Catharine Tiernan was alive, she being dead, the said Slevin has now no such interest as will enable him to recover the possession of said premises in this action."

a. One reason advanced by the counsel for the defence was that the assignment fell within the provisions of the statute of uses, and was executed by the statute, so that Slevin had no title in him; that is to say, when Tiernan assigned the lease to Slevin, for the use of his (Tiernan's) wife, the statute of uses transferred the legal title to Mrs. Tiernan, which vested in her all of the title, both legal and equitable, leaving no title whatever of any kind in Slevin to enable him to recover in this action. But in answer to all this, we assert, fearless of successful refutation, that the statute of uses does not apply to leases or leasehold interest of any kind. (2 Black., s. p. 336; 4 Kent, 302, 6 ed.; Sanders on Uses, vol. 1, s. p. 86, 87 & 89; Adams on Eject., t. p. 132, s. p. 88, 4 ed.)

As the interest of Mr. Slevin is a leasehold interest, the statute of uses has no application to this case, which will be fully seen and understood by reading the authorities above quoted. The statute of uses of 1845 of Missouri, which was in force in 1853, at the time of the assignment of the lease, is similar in all its provisions to the English statute of uses of 27 Henry VIII., chap. 10, on which the foregoing authorities are based. The statute of uses was discussed at considerable length in 19 Mo. 147, which may have some bearing in favor of the plaintiff. (See, also, 4 Kent 496, and Sanders on Uses, vol. 2, p. 58.)

b. It was also contended by the defendant in the court below that Tiernan had an interest in the equitable estate of Mrs. Tiernan, because the assignment did not in effect state that the property was to be enjoyed by her separate and apart from her husband. Where third persons convey an estate of inheritance to a trustee for the use of a married woman, her husband has a life estate in the land, called a *curtesy*, unless the deed contains expressions indicating that it is to be enjoyed by her separate and apart from her husband, or free from his control or interference; but this principle does not apply where the husband himself conveys an estate of inheritance to a trustee for the benefit of his wife. (26 Conn. 226.)

The principle in this case, last cited, is that the husband is estopped by his own deed. If he conveys to another all of his right, title and interest for the benefit of his wife, the law will not allow him to deny or contradict his own deed, by claiming an interest in the same land which he conveyed by the deed itself.

c. The husband, however, has no life estate, or curtesy, in any of the real estate of his wife, except where she owns an estate of *inheritance* in the land—that is, an estate in fee simple. (2 Black., s. p. 126; 4 Kent, 26.) As the interest, therefore, held by Slevin in trust for Mrs. Tiernan is a mere leasehold interest, the husband had no curtesy, or any other interest whatever, in the property.

V. It may be that the court below intended to convey the idea that a trustee could not sue, but the most undoubted authorities go to establish the doctrine that a trustee can sue without joining the beneficiary with him—Adams on Ejectment, 4 edition, 127 ; and the same author holds that a trustee can maintain an action of ejectment even against the beneficiary. (Adams on Ejec., 4 ed., p. 43.) So, Slevin having the legal title, could even bring an action against all or any of the legal representatives themselves of Catharine Tiernan, if they were in possession.

VI. The second instruction seems to convey the idea that the trusteeship of Slevin ceased when Mrs. Tiernan died. We are wholly unable to see how the court came to such a conclusion. John Biddle has parted with the property for nine years and nine months. Anthony Tiernan parted with his interest for the whole term. So neither Biddle nor Tiernan can claim the lot ; and as Mrs. Tiernan left children to inherit her property, it did not escheat to the State. Then, who is entitled to it ? Certainly Slevin holds it as trustee for the equitable representatives of Mrs. Tiernan, in the same manner and under the same rules and regulations as he held the property for Mrs. Tiernan in her life-time. (Gibbons and others v. Gentry, 20 Mo. 468 ; Blue v. Peneston, 24 Mo. 240.)

VII. An attempt was made by the defendant to show that Tiernan was insolvent in 1853, at the time of the assignment by him to Slevin.

a. But no evidence was introduced, or even offered, to contradict the evidence produced by the plaintiff, which shows very plainly and unquestionably that the consideration money that was paid for the assignment was not the money of Tiernan, but was money saved by Catharine Tiernan out of her own earnings, and out of the gifts and presents made to her by her parents. It is wholly immaterial, therefore, as to whether Tiernan was solvent or insolvent. An insolvent man can, in good faith, sell his property, as well as a solvent one ; and the purchaser will get an unquestionable title to the property as well in one case as the other.

b. As no fraud was set up in the answer, none could be given in evidence. To attack the conveyance for fraud, requires a proceeding in the nature of a proceeding in equity; and a cause of action in equity has to be specially set forth, and issues made on the subject in the same manner that issues were made up under the former chancery practice. (*Vasquez v. Ewing*, 24 Mo. 31.)

c. But even if the proper issues had been made, and sufficient proof had been produced on the subject of fraud, it would have no application in this case, because the debt under which the property was sold, as the property of Tiernan, was not contracted by Tiernan until the latter part of 1854, nearly two years after the assignment. The statute of 1845, to prevent fraudulent conveyances, (which is similar to the English statute of 27 Elizabeth,) speaks, it is true, of "prior and subsequent creditors," but from the whole law it will be seen that it is only for the benefit of those who are defrauded or injured by such conveyances. It is an elementary rule of law that no one can be allowed to entertain a suit, or action of any kind, who is not injured in any manner. The term *subsequent* creditors, therefore, as used in the act of 1845, is only intended to include such subsequent creditors as have been, in some manner or other, injured by a fraudulent conveyance.

The better American doctrine seems to be that voluntary conveyances of land *bona fide* made, and not originally fraudulent, are valid against subsequent purchasers. (*Jackson v. Town*, 4 Cowen, 603, 604; *Ricker v. Ham*, 14 Mass. 139; *Cathcart v. Robinson*, 5 Peters U. S. Rep. 280; 4 Kent, 464.)

McClelland, Moody & Hillyer, for defendant in error.

I. This action is barred by the judgment rendered by the Land Court, May 19, 1858, in favor of *Brown v. Tiernan, &c.* Tiernan was in possession, not accounting to Slevin, up to the time that suit was brought, and to about the time of the trial and judgment. Slevin testified at that trial, and his title was set up as an outstanding title.

II. The leasehold assigned is for a term less than twenty years, and is a chattel interest which passes to the administrator, and not to the heir.

At common law, all leasehold estates passed to the administrator, and we have no statute changing this when the term is less than twenty years.

At the death of Catharine Tiernan, the interest assigned and all the purposes of the trust ceased, and the leasehold title remained as if no assignment had been made. (Hill on Trustees, 340.)

III. The effect of the assignment, if not in fraud of the creditors, is, by the statute of uses, a mere trust in Slevin, and, therefore, a direct grant to Catharine Tiernan. No power is given to Slevin to take possession; and he, therefore, cannot take possession nor maintain this suit.

IV. A grant by husband to wife, during coverture, is void in law. It will be sustained in equity only when shown to be consistent with the rights of creditors. (10 Pet. 583; 7 J. C. R. 57; 2 Swanst. 97, 113.)

V. The assignment was without any consideration, and made for the uses of Anthony himself; and was, therefore, void as against prior and subsequent creditors and purchasers. The money paid was Tiernan's money, and was paid by Slevin to Tiernan and wife. A husband has no power, while indebted, to convey his real estate to a trustee for his wife, even for its cash value, and then expend the money in improvements for her benefit. (2 Kent, 143; Claney, Husband & Wife, 3.)

BATES, Judge, delivered the opinion of the court.

This was an action of ejectment for the possession of certain leasehold premises in the city of St. Louis, held for a term less than twenty years. The plaintiff claimed under an assignment of the lease from Anthony Tiernan, as follows:

"*State of Missouri, County of St. Louis, ss.*

"Be it remembered, that, on this 22d day of January, 1853, I, Anthony Tiernan, do hereby transfer the foregoing lease, with all its advantages, together with all its liabilities, to Ber-

nard Slevin, as trustee for Catharine Tiernan, and for her use and benefit during the term of said lease, for and in consideration of the sum of nine hundred dollars, to me in hand paid by said Catharine Tiernan, receipt of which is hereby acknowledged.

"In witness whereof, &c.

"ANTHONY TIERNAN, [L. S.]"

Catharine Tiernan was the wife of Anthony Tiernan, and had died before this suit was brought. Some evidence was given tending to show that the assignment of the lease was made in fraud of creditors of Anthony Tiernan, and there was also given in evidence the record of a former action of ejectment of the present defendant, John Brown, against Anthony Tiernan, in and by which Brown recovered and received the possession of the same premises, which suit was commenced in September, 1857. The court gave the following instructions:

"1. If the plaintiff in this case claims under Anthony Tiernan, and if the action brought by the defendant, John Brown, against Anthony Tiernan and others (the record of which is in evidence in this case) was brought for the recovery of the premises in question in this suit; and if the said Anthony Tiernan, or those claiming under him, set up as a defence in that action the identical claim of title on which the plaintiff now seeks to recover, then the judgment in that case in favor of Brown is a bar to this action.

"2. Whatever might have been the effect of the assignment made by Anthony Tiernan to Bernard Slevin of the lease in question while Catharine Tiernan was alive, she being dead, the said Slevin has now no such interest as will enable him to recover the possession of said premises in this action."

Verdict was given for defendant.

We think both of the instructions given were erroneous.

As to the first instruction. The act for the recovery of the possession of lands of 1855, (vol. 1, R. C., p. 695,) in section 33, provides that a "judgment, except of non-suit, in an ac-

tion authorized by this act, shall be a bar to any other action between the same parties, or those claiming by or under them, as to the same subject matter." An act amendatory of that act, approved November 21, 1857, (Laws of adjourned session of 1857,) repealed the 33d section of the original act. We conceive this to be equivalent to declaring that such judgment is not a bar to another action.

As to the second instruction. [The assignment by Tiernan to Slevin is not affected by the statute of uses, because it concerns a chattel only.] It is not fraudulent *per se*. It may be fraudulent, but the fraud must be shown by extrinsic testimony, and is a question of fact. [The assignment vested the legal estate in Slevin, and we are unable to see how that is affected by the death of Mrs. Tiernan. Her administrator may have the beneficial interest in the property, but the legal estate remains in Slevin until some act is done to divest it.

Judgment reversed and cause remanded. Judges Bay and Dryden concur.]

JOHN W. ENGLISH *et al.*, Appellants, v. FRANCIS BEEHLE
et al., Respondents.

Conveyance.—A deed, dated March 31, 1810, granted lands to a married woman, to hold to her and her heirs in a direct line, to have, manage and dispose of at her will and pleasure, not be liable to the acts of her husband, it being necessary that said lot should always remain as the property of the children, the heirs of the said wife. *Held*, that the wife took an estate in fee simple with full power to convey the title absolutely.

Appeal from St. Louis Land Court.

Morehead, for appellants.

I. The deed was made in 1810, when the Spanish law was in force, and does not seem to have been a purchase by the grantees, but a donation for considerations not expressed. (10 Mo. 262; 2 Hennen's Dig. 1066.) The entire deed should be looked to, and the subsequent acts of the parties should have great weight. (3 John. 394; 26 Mo. 49; 28 Mo. 478.)

II. The limitation to the direct line in this case excludes collaterals who might be heirs, so that the children took as purchasers. (Willes, 332; 16 Ga. 615.)

BATES, Judge, delivered the opinion of the court.

This is a suit to recover possession of an undivided interest in a lot of ground in the city of St. Louis. The plaintiffs claim as representatives of one of the several children of Marianne Belford (*née* Guitarre). On March 31, 1810, Jean Latresse, being owner of the lot, executed a deed in the French language, which is translated as follows:

"Know all men by these presents, that I, Jean Latresse, residing in the town and district of St. Louis, and Territory of Louisiana, for the price and in consideration of the sum of one dollar, money of the United States, which has been well and duly paid me by Marianne Belford, by birth Guitarre; also, for other considerations, I have this day sold,

ceded, relinquished, abandoned and transferred, and by these presents I sell, cede, relinquish and transfer to the said Marianne Belford, by birth Guitarre, all the rights, titles, actions, claims and property which I have and can have in and to a lot (describing it) for the said Marianne and (*ainsique*) her heirs in a direct line, to have, manage and dispose of (*en-jourir, faire et disposer*) at her will and pleasure, and as of property belonging to her, and so that the said lot above sold may not be pledged, obligated, aliened, encumbered and mortgaged to satisfy the engagements which Belford, the husband of the said Marianne, might enter into, it being necessary that the said lot should always remain as the property of the children, the heirs of the said Marianne, (*devant toujours le dit terrain sus vendu rester aux droits des héritiers enfans de la dite dame.*)”

On the 27th September, 1830, Marianne Belford, together with Francis Lafrance and wife, and Jean Latresse and wife, by deed, conveyed the same land to James Adams, said Marianne retaining the right of possession and use during her life.

Marianne Belford has since died; she had several children. In this case the court, at the instance of the defendants, instructed the jury as follows :

The deed from Jean Latresse to Marianne Belford, born Guitarre, read in evidence, vested all the title which said Latresse had in and to the premises therein described in said Marianne Belford in fee, and she had the power to convey the said title thereto absolutely. And the deed from said Marianne and others, read in evidence, and dated in 1830, conveyed said title to said James Adams.

The only questions for consideration arise upon the deed of Latresse to Marianne Belford. This deed evidently passed all the title which Latresse had in the premises, and it is contended on the one hand that the title so passed was vested in Marianne Belford in fee, with full power of alienation; whilst, on the other hand, it is contended for the plaintiffs that there was only vested in her a life estate, with remainder to her children. Accepting the translation of the deed given

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if evidence as correct, we are of opinion that the expressions which are relied upon as limiting the right of Mrs. Belford to a life estate are not such limitations. The reference to her heirs in a direct line in that part of the deed which directs how she shall have, manage and dispose of the property, do not constitute her children purchasers; and being immediately followed by the statement of her power to dispose of the land at her will and pleasure, and as of property belonging to her, are no limitation upon her absolute power of alienation. The expression at the end of the deed, "it being necessary that the said lot should always remain as the property of the children, the heirs of the said Marianne," is only an explanation of the reasons for creating a separate estate in the wife, not subject to the obligations of her husband.

Judgment affirmed. Judges Bay and Dryden concur.

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EUGENE JACCARD, Respondent, v. WM. C. ANDERSON, JR.,
Appellant.

Pleading—Note.—In a suit by the holder against the endorser of a promissory note, the petition must set out the facts which in law make the note negotiable, as that the note contains the words "value received, negotiable and payable without defalcation;" and it is not sufficient to allege that the note was negotiable, which would be a conclusion of law, and not a statement of fact.

Pleading—Demand and Notice.—In a suit to make the endorser of a negotiable promissory note liable, the petition must aver demand of payment from maker, refusal and notice to endorser, or the facts which will excuse or be equivalent to it, in order to show the defendant's liability.

Arrest of Judgment.—Where the petition does not state facts sufficient to constitute a cause of action, the judgment should be arrested.

Appeal from St. Louis Circuit Court.

Gardner and Cox, for appellants.

I. The petition is fatally defective.

a. It does not show the note declared on to be negotiable by the law of this State. (R. C. 1855, p. 295, § 15.) It does not set out the words which give the note negotiability.

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b. It contains no averment of *demand and refusal*, or of facts which excuse the laches of the holder. The averment that said note was not protested at defendant's instance and request, he waiving protest, is insufficient. Presentment and demand and protest are distinct things in determining the sufficiency of a pleading.

The petition, therefore, does not set forth facts to constitute a cause of action, and no valid judgment can be pronounced upon it. (*Ivory v. Carlin*, 30 Mo. 142; *Weaver v. Beard*, 21 Mo. 155; *Maloney v. Boernstein*, 30 Mo. 144; *Andrews v. Lynch*, 27 Mo. 167; *Anderson v. Gill*, 15 Ark. 9.)

A. J. P. Garesché, for respondent.

I. The petition is sufficient. It shows that the note was not protested at defendant's instance and request, he waiving protest. (R. C. 1855, p. 1329, § 3; p. 1236, § 34; p. 1239, § 39.) The word protest means taking such steps as to charge the endorser. (*Coddington v. Davis*, 3 Denio, 25, s. c. 610; *Beale v. Peck*, 12 Barb. 250; *Cook v. Litchfield*, 5 Sand., N. Y., 341; 10 Barr., Penn., 103.)

DRYDEN, Judge, delivered the opinion of the court.

The plaintiffs, as the last endorsers of a promissory note, sue the defendant, as first endorser. Their petition is as follows, viz:

"Eugene Jaccard, Augustus Mermor and D. Constant Jaccard, plaintiffs, v. William C. Anderson, Jr., defendant. In St. Louis Circuit Court, St. Louis county.

"Plaintiffs, by Alex. J. P. Garesché, their attorney, state that they are partners, associated together as E. Jaccard & Co.; that Washington King, by his negotiable note herewith filed, dated April 16th, 1856, promised to pay to defendant, or his order, one thousand dollars, one year after date; that defendant assigned by endorsement and delivered said note to E. H. Bussell, and said E. H. Bussell assigned by endorse-

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ment and delivered same to plaintiffs. Plaintiffs further state that said note was not protested at defendant's instance and request, he waiving protest; that no part of said note has been paid. They further ask judgment for said sum of one thousand dollars, interest, and costs.

ALEX. J. P. GARESCHÉ,
Attorney for Plaintiffs."

The defendant answered, and a trial of the case was had, and a verdict and judgment were rendered for the plaintiffs. Several exceptions were taken in the progress of the trial, which it will be unnecessary for us to notice. In due time the defendant moved in arrest of the judgment because of the insufficiency of the petition, and the motion being overruled, he excepted and appealed to this court.

The petition is defective in not stating facts sufficient to constitute a cause of action. In order to render an assignor liable to the assignee it must appear by the petition, either that the note assigned is negotiable, or, if not negotiable, that the maker was insolvent or non-resident of the State; or that the assignee, in the diligent prosecution of a suit against the maker, had been unsuccessful in making the debt. It does not appear by any averment of fact in this case that the note assigned was a negotiable instrument, nor are such facts shown as are necessary to impose a liability upon the defendant as assignor of a note not negotiable. True, it is stated, or rather recited in the petition, that the note is negotiable; but this is the statement of the conclusion or opinion of the pleader, not the averment of a fact upon which issue could be taken or the judgment of the law be pronounced. The operative words in a negotiable note under the law of this State are "for value received, negotiable and payable without defalcation," and their employment in the instrument declared upon must appear in the petition in order to enable the court to see and pronounce the legal effect of such instrument.

Again, supposing the note declared upon negotiable, the averment of an essential element of the defendant's liability

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is omitted in the petition, viz: the demand or excuse for failure to demand payment of the maker. It is averred that "at defendant's instance and request the note was not protested, he waiving protest," and it is urged in the argument that this waiver is in law a waiver of demand. However this may be, (and we express no opinion upon the point,) it does not reach the point of difficulty. The question under consideration is a question of pleading; the effect of the waiver of protest is a question of evidence. There must be an averment of a demand, or of facts which will excuse and be equivalent to it, in order to show the defendant's liability. What effect the waiver of protest may have in proving the excuse alleged is another matter. Its sufficiency for the purpose renders the averment in the petition none the less necessary.

The court erred in overruling the motion in arrest, and for this cause its judgment is reversed and the cause remanded, with direction to permit the plaintiffs to amend their petition if they desire to do so. The other judges concur.

CITIZENS' BANK OF STEUBENVILLE, Respondent, v. JOHN B. CARSON, Appellant.

Account Current—Balance.—A banker is not required by law to apply a balance due by him on account current to his depositor to the payment of a liability from his customer to himself upon a bill or note. In a suit by the banker against the acceptor of a bill, the fact that the drawer had an account with the banker, and that after protest of the bill there were balances in favor of the drawer, would not be evidence in favor of the acceptor to show a payment or satisfaction by the drawer.

Accord and Satisfaction.—The taking a promissory note for an antecedent debt does not extinguish the obligation, unless the note be accepted in satisfaction.

Appeal from St. Louis Circuit Court.

This was an action on a bill of exchange by the endorser against the acceptor. The bill was drawn by George H. Orth & Bro., at four months, upon John B. Carson, and accepted by him, payable to the order of said Orth & Bro., and

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endorsed by them to the Citizens' Bank of Steubenville, the above appellee and holder. The appellant, John B. Carson, sets up payment as a defence to said action that if the same was not paid by Orth & Bro., the endorsers of said draft, then said Citizens' Bank, the holder thereof, was guilty of laches in not collecting the same from the endorsers, Orth & Bro., whereby they have lost all remedy against the acceptor John B. Carson, and that thereby said John B. Carson was discharged, and should not be held liable to pay the same. At the trial the defendant offered to introduce the bank account of Orth & Bro. with the Citizens' Bank, which was objected to and excluded by the court on the ground of irrelevancy and incompetency. The court then gave the following instructions for the plaintiff:

"Although the court may believe from the evidence in the cause that the endorsers and drawers of the bill gave their note for the amount of said bill, yet this is no defence to this action unless the court further finds that said bill was paid and satisfied by said Carson or some one else.

The giving of the note of said Orth & Bro. for said bill, with the bill as collateral security, and if the said note was never paid, is not payment of said bill, and so the court should find. The giving of a note for a debt is not payment of the debt, unless said note be paid or agreed to be taken in payment of the debt, nor is a renewal of said note a payment of said note, nor the original debt for which it was given.

If the court finds the facts to be that said Orth & Bro. negotiated said bill of exchange in question to the plaintiff for value before maturity, and that the same was accepted by defendant, John B. Carson, and that after said bill was protested and returned to plaintiff unpaid, said Orth & Bro. gave plaintiff their note for the amount of said bill, and that the plaintiff retained said bill as security for said note of Orth & Bro., and that after said note of Orth & Bro. fell due it was renewed, and that neither said note nor the renewal thereof was ever paid nor agreed to be taken in payment of or as an extinguishment of the right of action on

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said bill, then the court will find for the plaintiff, and assess the damages at the face of the bill, together with damages at the rate of ten per cent. and interest on the amount of bill and damages from the maturity thereof to the present time, at the rate of six per cent.

If the court finds the facts to be that defendant, John B. Carson, accepted the bill in question, either before or after it was negotiated to plaintiff, then he becomes the principal debtor on said bill to said Bank of Steubenville, and it makes no difference whether he had funds in his hands at the time of said acceptance or the maturity of said note or not; and so far as the plaintiff is concerned, his liability was fixed by his acceptance of the bill, and no extension granted to the drawers or endorsers of said bill, or failure on the part of the plaintiff to sue or collect the same of the drawers or endorsers, will operate as a discharge to the defendant. And if the court further finds that said bill was never paid to said plaintiff, and that said plaintiff did not agree to take any other note in payment thereof, then the court will find for the plaintiff; and in that case it makes no difference whether said bill was held by the plaintiff as the primary debt, or as collateral security for another note of Orth & Bro. given for the amount of said bill, if said note of Orth & Bro. was never paid to said bank."

The following instructions on behalf of the defendant were given :

1. If the court, sitting as a jury, finds that the plaintiff accepted a note from Orth & Bro. for the amount of the bill in satisfaction of said Orth & Bro.'s liability on the bill as drawers and endorsers, it would, at the same time, release Carson, the acceptor, from all liability to plaintiff on the bill, no difference what the understanding might be between Orth & Bro. and the bank as to whether Carson should be released from the bill or not, the bank being entitled to but one satisfaction of the bill.

To the giving of which instructions the plaintiff excepted.

Defendant also prayed the following instructions, which were refused :

2. If Orth & Bro. were at the same time indebted to the bank in several amounts in addition to their liability as drawers of the bill, and all of these demands, including amount of bill, were brought into one sum, and one or more notes given therefor without regard in size to the separate amounts of the original debts, it would make out a *prima facie* case of intended satisfaction of Orth & Bro.'s liability upon the bill as well as of the other debts.

Defendant asked the following instructions, which were refused :

3. If, after the bill was protested for non-payment, plaintiff, who was banker for Orth & Bro., had a balance on deposit account with plaintiff sufficient to satisfy the debt represented by the bill, and owed the plaintiff no other debt then due, or to the payment of which said balance was applied, or for the security of which it was then intended by plaintiff to be held, and the plaintiff did not apply said balance to the debt of the bill, then Carson would be discharged from all liability on the bill, plaintiff failing to make such application at its own risk.

4. If, after the bill was protested for non-payment, the plaintiff, being banker for Orth & Bro., agreed to look primarily to them by taking their note for the amount of the bill, or in any other manner, and, after such agreement, Orth & Bro. had a balance on deposit account with plaintiff sufficient to satisfy the debt, and plaintiff at the time had no other claim against Orth & Bro. which was due, or for the payment or security of which it contemplated holding or applying said balance, and did not apply the same to said bill, or the note given as aforesaid therefor, if then due, but did permit Orth & Bro. to check out the same without regard to its intended use ; the failure to make such application would therefore exonerate Carson, the acceptor, from liability on the bill to plaintiff, plaintiff having failed to make such application at its own *risk*, especially so, if after the existence

of such balance Orth & Bro. had become insolvent, and Carson would be unable to recover thereon, if entitled to do so.

5. The acceptance of the note of Orth & Bro. by plaintiff for the amount of the bill, if it did not satisfy the bill in plaintiff's hands and release Carson from liability to plaintiff, bound the plaintiff to the use of due diligence in endeavoring to collect said note before proceeding against Carson upon the bill, which due diligence the plaintiff must prove in the action upon the bill.

6. If, after the protest of the bill for non-payment, the plaintiff and Orth & Bro. agreed that the latter should give their note for the amount of the bill, and plaintiff should retain Carson's acceptance with a view to holding Carson collaterally as security for the payment of the note, and the note was given upon this understanding, such arrangement, if it did not satisfy the bill, placed Carson in the condition of a security to the note, and the renewal of the note, or the giving of time thereon, by binding agreement, without Carson's consent, would work his discharge.

Hume and Jecko, for appellants.

I. The bank was bound to apply the funds in its hands of Orth & Bro. to the payment of the debt due by them. (*Marsh et al. v. Houlditch*, cited Chit. Bills, 414, *n.*; *Clayton's case*, 1 Meriv. 589; *Hammersly v. Knowleys*, 2 Esp. R. 665; *United States v. Kilpatrick*, 9 Wheat. 720; *Goss v. Stinsen*, 3 Summ. 99.)

Lackland, Cline and Jamison, for respondent.

I. The note of Orth & Bro. taken by the bank did not satisfy and pay the bill, because it was not taken in satisfaction of the debt. (*Appleton v. Kennon*, 19 Mo. 637; *Johnson v. Weed et al.*, 9 John. 310; *Toby v. Banks*, 5 John. 68; *Bank v. Fletcher*, 5 Wend. 87; *Owenson v. Moore*, 7 Tenn. 64.)

II. The bank account was properly excluded.

BATES, Judge, delivered the opinion of the court.

This suit is brought upon a bill of exchange drawn by Orth & Bro. upon Carson, who accepted it, but failed to pay at maturity, and it was duly protested. After the dishonor of the bill, Orth & Bro., the drawers of it, made an arrangement with the plaintiff, which was the holder of it, whereby the drawers gave their note to the plaintiff for the amount of the bill, the plaintiff still retaining the bill. The note was not paid. The court below, upon the trial, instructed that if the note was given and accepted in satisfaction of the bill, the defendant was thereby discharged; but if the arrangement was not in satisfaction of the note, the defendant was not discharged thereby.

The plaintiff was the banker of Orth & Bro. During the trial the defendant offered in evidence the bank account of Orth & Bro. with the plaintiff, to show that after the bill matured and the note was given, Orth had balances on deposit with the plaintiff equal to the amount of the bill.

This testimony was rejected, to which the defendant excepted. We see no error in the action of the Circuit Court. The defendant was primarily liable upon the bill, and unless the plaintiff accepted Orth & Bro.'s note as an extinguishment of the bill, his liability is not discharged. It plainly appears from the testimony that there was no intention to discharge the defendant, and the acceptance of the note had not (against the intention of the parties) that legal effect. The bank account offered in evidence was properly excluded. The plaintiff was not bound, even if it had the right, to apply a balance of current account to the payment of a liability fixed by bill or note, and it is only upon the opposite supposition that the account was relevant evidence.

Judgment affirmed. Judges Bay and Dryden concur.

JACOB WOODBURN *et al.*, Appellants, v. WILLIAM RENSHAW,
Respondent.

Covenant, not running with the land.—A covenant by the assignee of a lease, with his assignee, that the premises were free and clear of and from taxes, assessments and encumbrances, the failure to pay which exposed the lease to forfeiture, and which was broken as soon as made by the actual liability for taxes and assessment due at the date of the covenant, does not run with the land to the grantee of the second assignee by a deed conveying merely the leasehold premises.

Assignment of right of action.—To give the grantee in the assignment of a lease a right of action upon the broken covenants of a prior assignee, the right of action upon the breaches of the covenant must be assigned. The verbal promises of the prior assignee to the subsequent assignee to pay the sum due for the breaches of the covenant would be void for want of a consideration between the parties.

Appeal from St. Louis Land Court.

This was an action upon the breach of a covenant in a lease. In April, 1847, Elizabeth Ashley rented to one Joseph S. Morrison, by indenture of lease, certain land on Broadway, in the city of St. Louis, and in the lease was the following covenant, to-wit:

"This lease may be renewed for ten years longer after the expiration hereof, provided the said lessee, or his legal representatives or assigns, shall punctually pay all the rent and taxes of every description, nature and kind which may be legally assessed on, or legally demanded of said premises, as the same shall become due, and perform all the other covenants, agreements and stipulations herein set forth."

Joseph S. Morrison went into possession under the said lease, and died in possession, in 1849, intestate. William Renshaw, Jr., the respondent, the son-in-law of Joseph S. Morrison, administered upon the estate of his father-in-law, and also purchased, in his own behalf, the interests of all other persons in the leasehold under Morrison, deceased, and went into possession of all the rights and immunities of said leasehold formerly belonging to said Morrison. Renshaw remained in possession until May, 1855, when he assigned the

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remainder of the term to one Joseph La Barge, subject to the covenants of the lease.

Renshaw, during his possession, failed to pay the State and county taxes assessed for the years 1850 and 1851. The assignment from Renshaw to La Barge was as follows, to-wit:

He "assigned, transferred and set over unto one Joseph La Barge the said deed of lease from said Elizabeth Ashley, with all and singular the premises therein mentioned and described, and the buildings thereon, together with the appurtenances, to have and to hold the same unto the said Joseph La Barge, and to his heirs and assigns, from the first day of May, 1855, for and during all the rest, residue and remainder yet to come, of and in the term of years mentioned in the said indenture of lease; subject, nevertheless, to the rents, covenants, conditions and provisions therein also mentioned; the said Renshaw covenanting, granting, promising, and agreeing to and with the said Joseph La Barge that the said assigned premises now are free and clear of and from all former and other gifts, grants, bargains, sales, leases, judgments, executions, back rents, taxes, assessments, and encumbrances whatever, done or suffered by him, excepting two leases made by him to Jacob Woodburn, one dated December 15, 1853, and the other dated June 1, 1854, both of which were assigned to said La Barge."

Joseph La Barge remained in possession of the leasehold under this assignment until January, 1856, when he assigned the remainder of the term to Woodburn & Scott, the appellants, with all and singular the premises mentioned and described in the lease, and the buildings thereon, together with the appurtenances, to have and to hold unto the said Woodburn & Scott, and their heirs and assigns, from the first day of January, 1856, for and during all the rest, residue and remainder yet to come of and in the term of years mentioned in the said lease, subject, nevertheless, to the rents, covenants, conditions and provisions therein also mentioned.

At the end of the term of the leasehold, Woodburn & Scott applied to the agent of Mrs. Ashley for a renewal of the lease

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according to one of its conditions, but the agent refused to renew the same because Renshaw had failed to pay the county and State taxes for the years 1850 and 1851, which, together with the damages assessed by law, amounted to \$662.25. At this time, the appellants had property on the leasehold of the value of \$30,000 in buildings and machinery. The property leasehold had been sold for the taxes.

The appellants informed Renshaw, respondent, of the circumstances of the non-payment of the taxes by him, and of the refusal of the agent of Mrs. Ashley to renew the lease unless the taxes and damages were paid; whereupon he promised Woodburn & Scott to pay the taxes and damages arising thereby, but failed to do so, and appellants were finally compelled to pay the same in order to protect their property and obtain a renewal of the lease.

Woodburn & Scott sued Renshaw for \$662.25, interest on the same, and costs. The case was tried by the court on the following agreed statement of facts, to-wit:

"It is agreed to submit this case to the court upon the following statement of facts: That Elizabeth Ashley leased the premises mentioned in the petition to Joseph S. Morrison, by the lease therein described, a copy of which is filed in the cause; that defendant, after the death of Morrison, acquired by purchase, by deed of Morrison's heirs to him, of date 24th October, 1851, the entire ownership of said lease, and entered into possession of the premises; that said defendant failed to pay the taxes assessed on said property by the county of St. Louis and State of Missouri, for the years 1850 and 1851; that defendant subsequently thereto, to-wit, on or about the — day of May, 1855, assigned said property to Joseph La Barge, by the assignment filed with the petition, and made the covenant therein, and that said La Barge, under said assignment, entered into possession of the premises; that said La Barge continued in possession until January 1, 1856, complying with all the covenants and agreements resting upon him by virtue of said lease and said assignment, at which time he executed to plaintiffs a conveyance of his right and

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title in the premises, which conveyance is also on file with the petition, and put plaintiffs in possession of the said premises; that plaintiffs continued in possession of said premises, complying with all the covenants and agreements resting upon them by virtue of said lease and said assignment, until the 15th day of April, 1857, at which time they had upon said premises property to the value of at least \$30,000, in buildings and machinery; that up to said 15th day of April they had remained undisturbed in their possession; that on said 15th day of April, 1857, the time limited by said lease expired, and they applied to J. T. Sweringen, attorney in fact of Mrs. Crittenden, late Mrs. Ashley, to renew said lease upon the covenants and agreements therein contained, but were refused, in consequence of the failure of defendant to pay the taxes for the years 1850 and 1851, aforesaid, and of the sale of said property for taxes in October, 1852, in consequence of such failure; that defendant was notified of such refusal, and the reason thereof stated to him, and that defendant agreed to settle and pay off the same, but failed so to do; and that plaintiffs thereupon, in order to protect their property on said premises and to obtain a renewal of said lease, paid off said taxes, with the damages thereon accrued according to law, amounting to the sum of \$662.25; and that defendant administered on the estate of Morrison in 1849."

On this statement of facts the court found for defendant.

R. S. Voorhis, for appellants.

I. The terms of Renshaw's deed to La Barge raise the implied covenants of title and quiet enjoyment, both of which run with the land. The word granting has that force. (*Hamilton v. Wright's Adm'r*, 28 Mo. 199, and cases cited.)

The covenant of renewal runs with the land, and passed to the appellants. (1 Platt on Leases, 733; 4 Jarm. Conv. 426.) The title and possession of the premises passed from Renshaw to La Barge, and from him to the plaintiffs, and carried the implied covenants of title.

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In contemplation of law, the covenants of Renshaw were not broken until the appellants were compelled to pay the delinquent taxes to avoid an eviction. Their possession gave them a right of action. (1 Smith's L. C. 152; Taylor, Land. & T., 291, § 445.)

II. The covenant of Morrison to pay taxes is incidental to the land and runs with it, for the covenant to pay taxes follows the covenant to pay rent. (2 Platt on Leases, 170; Norman v. Wells, 17 Wend, 136; 1 Smith's L. C. 134.) And the covenant to pay rent runs with the land and binds the assignee, though the lessee does not covenant for his assignee. (2 Platt on Leases, 163; 5 Coke, R., 16.) Renshaw *expressly* covenanted against taxes, assessments and encumbrances done or suffered by him.

The covenant to pay taxes is a real covenant, and runs with the land. (Taylor, Land. & T., 167; 2 Platt, L., 170; 4 Jarm. Cov. 425; 1 Smith's L. C., 1543; Coke, R., 25, Spencer's case; 5 Coke, R., 16.)

III. If Renshaw's covenant was broken as soon as made, still the plaintiffs can recover. (Page & Bacon v. Gardner, 20 Mo. 507.) The plaintiffs are in equity the real parties in interest. (R. C. 1855, p. 121; Vandorn v. Relfe, 20 Mo. 455.)

Krum and Decker, for respondent.

I. The plaintiffs seek to recover not for covenants broken, but for conditions unperformed. (Geary v. Reason, 3 Croke, 128; United States v. Brown, 1 Paine, C. C., 422.)

II. If there be a covenant, the covenant was made between lessee and lessor, and no action can be maintained upon it by any other than him with whom it was made, or his assigns.

The plaintiffs are not assignees of the covenant, and are strangers to the contract, and were not parties to the consideration.

III. The covenant of defendant with La Barge was a personal covenant, and if broken La Barge alone can sue for it.

A covenant against encumbrances is a personal covenant, and does not run with the land, unless the assignees are ex-

pressly named. (4 Kent, C., 471; Rawle on Cov. 380; Collier v. Gamble, 15 Mo. 470; 6 Cush. 124; 22 Pick. 493.)

To maintain an action of covenant, there must be privity of contract or privity of estate. There is no privity of contract in this case, because the covenant was with La Barge. There is no privity of estate, for as Renshaw was himself assignee, when he assigned to La Barge he ceased to have an estate.

IV. The appellants are assignees after breach, and covenant does not lie by an assignee for a breach committed before his time. (Taylor, Land. & T., 292.)

La Barge never assigned his right to sue, and may now sue upon the covenant. (Van Doren v. Relfe, 20 Mo. 455.)

V. The word "grant" in an assignment creates no covenant by assignor to assignee. (Blair v. Rankin, 11 Mo. 440; Waldo v. Hall, 14 Mass. 486; Rawle on Cov. 473, note.)

BATES, Judge, delivered the opinion of the court.

We are compelled to affirm the judgment in this case. Renshaw's covenant to La Barge that the premises were free and clear of and from taxes, assessments and encumbrances, (contained in his assignment of the lease, of which he himself was assignee of the original lessee,) and which covenant was broken as soon as made, did not pass to the plaintiff by La Barge's assignment of the lease to them, without an assignment of the covenant.

The covenant of the original lessee to pay taxes ran with the land, and while Renshaw held the land he was bound by that covenant; but that obligation was to the lessor, and the plaintiffs have no benefit of it.

The verbal promise of Renshaw, made to the plaintiffs after the assignment to them of the lease, and upon the discovery that taxes which should have been paid by him were in arrear and unpaid, that he would settle and pay off the same, however binding upon him in morals, is of no legal validity, for want of any consideration moving from the plaintiffs to him.

Judgment affirmed. Judges Bay and Dryden concur.

WARREN CURRIER, Respondent, v. SAMUEL B. LOWE, Appellant.

Pleading—Evidence.—A defendant cannot make a defence by the evidence upon the trial, unless it be presented by the pleadings.

Appeal from St. Louis Circuit Court.

This was an action upon an award at common law.

The petition stated that on February 28, 1859, controversies were pending between plaintiff and defendant concerning a contract for the building by defendant of forty cattle cars for the North Missouri Railroad Company, of which contract plaintiff was entitled to one half the profits; that said matter was referred to one Roberts, by consent of parties, who, having heard the parties and their proof, awarded the plaintiff the sum of one thousand nine hundred and six dollars eighty five cents, with fifty dollars, one half the arbitrator's costs.

The defendant by his answer denied the alleged submission; denies that he agreed to abide by the award, and denied that any legal and valid award was ever made in the premises.

Upon the trial, the plaintiff proved the written award of the arbitrator, of which a copy had been given to each party.

The arbitrator was called as a witness to prove the grounds of his award, &c. Evidence to show an error in the action of the arbitrator was excluded.

The court gave for plaintiff the following instruction, to which defendant excepted:

"If the court believe from the evidence, that matters in difference between plaintiff and defendant were submitted to James S. Roberts by them for his decision, they agreeing to abide by and perform his award, and said Roberts did make an award in writing in accordance with the terms of said submission, and delivered a copy thereof to plaintiff and defendant, then defendant is bound by said award, and plaintiff is entitled to recover the amount awarded to him as found

by said award, and interest thereon from the date of said award."

For the defendant, the court gave the following instruction:

"If it appear from the evidence that the contract between Lowe and Sedgwick, read in evidence by plaintiff, was a material part of the terms of the submission alleged by the plaintiff, and if it further appear that the arbitrator in making his award wholly disregarded any material provision for the benefit of defendant therein contained, then the award was invalid and plaintiff cannot recover thereupon."

Krum and Decker, for appellant.

I. Parol evidence was admissible to show that the arbitrator had committed a mistake of law or fact. (2 Green. Ev. 675-78; *Butler v. Mayer, &c.*, New York, 7 Hill 339; *Newman v. Labeaume*, 9 Mo. 30; *Frissell v. Fickes*, 27 Mo. 557; *Walker v. City Council*, 1 Bailey, Ch. 443; *Smith v. Spencer*, 1 McCord, Ch. 93; *Pratt v. Hackett*, 6 J. R. 14; *Severance v. Hilton*, 32 N. H. 289; *Hall v. Chandler*, 3 Gibbs, (Mich.) 524; *King v. Armstrong*, 25 Ga. 264.)

II. The plaintiff was not entitled to recover the costs of \$50 awarded against defendant. (Caldwell on Arb. 197, and cases cited; 8 Mass. 399; *Hansen v. Weber*, 40 Maine 194; *Vose v. How*, 13 Metc. 243; *Hinman v. Hapgood*, 1 Denio, 188.)

Currier, for respondent.

I. The evidence ruled out was properly excluded, because it was to the merits of the award which were not in issue, and not open to investigation under the pleadings. (R. C. 1855, p. 1232, § 12.)

II. The defence set up should have been specially pleaded. It was an equitable not a legal defence, and should have been properly stated in the answer. (*Taylor v. Carryall*, 12 Serg. & R. 243; *Newland v. Douglas*, 2 J. R. 61; *Bartlett v. Todd*, 3 J. R. 366; *Cranston v. Kenny*, 9 J. R. 212; *Phil. Ev., C. & H., n.*, 343.)

The authorities all distinguish between awards made under a rule of court and awards made in virtue of a voluntary submission at common law. The former can be corrected or set aside by the court granting the rule; the latter only in a court exercising chancery jurisdiction.

In this State, under the new system, the party seeking equitable relief must state the facts which authorize it. (*Jones v. Brinker*, 20 Mo. 87; *Vasquez v. Ewing*, 24 Mo. 31.)

III. The arbitrator was not a competent witness to prove the facts in avoidance of the award. (*Elmaker v. Buckley*, 16 Serg. & R. 72; *Kingsland v. Kincaid*, 1 Wash., C. C., 448; *Newland v. Douglas*, 2 J. R. 62; *Efner v. Shaw*, 2 Wend. 567; 1 Phil. Ev., C. & H., *n.*, 166; 1 Green. Ev., § 236 & 249.)

DRYDEN, Judge, delivered the opinion of the court.

The defendant urges two grounds of complaint against the proceedings of the Circuit Court, which we will notice in their order. First, that the court excluded the evidence which the defendant introduced to prove that the arbitrator had improperly refused him credits in the award to which he was entitled; and, second, that the court gave an improper instruction at the instance of the plaintiff. A third ground why the judgment of the Circuit Court should be reversed, viz., that the arbitrator exceeded his authority in awarding costs in the case, is urged by the defendant; but the point not having been made in the lower court by demurrer, answer, motion, or otherwise, the practice of this court has become so well settled, that, whether there was error in the matter or not, we would not feel at liberty to disturb the judgment for that cause, and will, therefore, take no further notice of the question.

1. An examination of the answer will show that it sets up no real matter constituting a defence; makes no objection to the award declared on, but spends its force in denying, first, the submission alleged; second, the mutual promise of the parties to abide the award; and, third, that an award was

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made. The defendant having staked his whole defence upon the denials of the allegations of the petition, cannot be allowed on the trial to turn himself about and make a case by the evidence not made by the pleadings. If such a practice were tolerated, it would lead to inextricable confusion in the trial of causes, and render pleading a mere cheat and snare. The evidence excluded was not only not applicable to any issue made in the cause, but was in direct conflict with the state of case made by the answer. The answer denied that an award had been made; the excluded evidence admitted the award, but sought to show it was *wrong*. If the defendant meant to rely upon the proposed defence, he ought to have laid the foundation for the introduction of the evidence to support it by appropriate allegations in his answer; but having failed to do so, whatever of merit there may be in it we cannot relieve him.

2. As to the second error complained of, we see nothing objectionable in the declaration of law in the nature of an instruction given by the court.

Let the judgment of the Circuit Court be affirmed; the other judges concurring.



JOHN SCHLEMMER, Respondent, v. WILLIAM NORTH,
Appellant.

Freehold.—Buildings erected upon land become part of the freehold, and do not belong to the tenant.

Tenant.—If a tenant be ejected by the landlord, he can only recover damages for the unexpired portion of his term.

Appeal from St. Louis Law Commissioner's Court.

This was a suit in trespass, commenced August 12, 1857, to recover the sum of one hundred dollars, for entering the premises of the plaintiff and tearing down and carrying away a frame house, &c.

The answer denied the trespass, and alleged the title to be in defendant.

It appeared that plaintiff was tenant of defendant, and had paid rent up to May 1, 1857, and that defendant procured possession from the sub-tenants, and on the 23d April entered upon the premises and tore down the buildings for the purpose of rebuilding.

The fifth, sixth and seventh instructions, prayed by the defendant and refused, were as follows :

5. The plaintiff cannot recover for the improvements alleged to have been torn down and carried away.

6. That if plaintiff notified his tenants to leave prior to the 1st May, 1857, and made efforts to induce them to leave, for the purpose of enabling defendant to remove said premises prior to the 1st May, with a view to rebuild, and defendant induced any of the tenants to leave by paying them a consideration for so doing, then plaintiff cannot recover for any act of defendant relating to the removal of any premises voluntarily abandoned by any tenant.

7. That if the plaintiff is entitled to recover in this case, the true measure of damages is the value of the rent from the time the premises were taken down until the 1st May following.

Instruction for plaintiff, given :

1. If the court finds from the evidence that plaintiff was entitled to the possession of the premises, and that defendant without the consent of plaintiff took possession of the same until the commencement of this suit, then plaintiff is entitled to recover the value of the premises from the time they were taken by defendant up to the commencement of the suit, unless the court finds that plaintiff's right to the possession terminated prior to commencing this suit.

Bay, for appellant.

A. M. & S. H. Gardner, for respondent.

BATES, Judge, delivered the opinion of the court.

This case was heretofore submitted to the court, and an opinion thereon prepared by Judge Ewing, whilst on the bench, but that opinion was not delivered or judgment rendered in accordance with it. The parties now agree that that opinion may be adopted as the opinion of the court and judgment entered in accordance with it.

The judgment of the court below is, therefore, reversed and the cause remanded. Judge Dryden concurs; Judge Bay not sitting, having been of counsel in the cause.

The opinion was as follows :

“The evidence tended to show that the premises were rented by the month, and that due notice was given to plaintiff, the tenant, to quit on the 1st May; that the premises were in possession of sub-tenants, who, prior to that date, were induced, for a consideration paid them by defendant, to leave; and on or about 23d April, the defendant removed the houses, being then vacant, with the view of rebuilding on his property. The defendant had previously recovered judgment against plaintiff for the rent of the property up to 1st May, and received payment.

“Under this state of facts, the plaintiff was entitled to the possession until the 1st of May, at which time, it seems from the evidence, his term expired, and to damages for injury to the possession from the 23d April, and the measure of damages, we think, would be the value of the use or rent of the premises for that period. The sub-tenants having voluntarily yielded possession in the manner stated, could have no claim against their landlord; and the plaintiff being bound to quit on the 1st of May, he could have none against the defendant for withholding possession after that date. The seventh instruction asked by the defendant should, therefore, have been given.

“The value of the improvements made by the plaintiff could not properly be considered in estimating the damages. Upon general principles, they became a part of the freehold;

and nothing appears, either as it respects the purpose for which they were erected, or the manner in which they were connected with the freehold, bringing them within any exception to the general rule on the subject. Nor is it claimed that there is any stipulation in the lease which would make them plaintiff's property, or give him the right to remove them. The fifth instruction prayed by the defendant should also have been given.

"Judgment reversed and the cause remanded. Judge Napton concurs. E. B. EWING."

ISAAC T. WISE, Respondent, v. DAVID P. HULL, GARNISHEE
OF WOLFF, Appellant.

Practice.—The defence that the assets of a judgment debtor have been transferred by his conviction for crime, and being sentenced to the penitentiary, if a defence at all, cannot be brought forward by a motion to dismiss; it should be presented by plea.

Garnishment, return.—The return day of a garnishment on execution from a justice of the peace, is the next law day of the justice, and not the return day of the execution. (R. C. 1855, p. 965, § 11.)

Appeal from St. Louis Law Commissioner's Court.

Decker & Voorhis, for appellant.

I. The civil rights of a person sentenced to the penitentiary for a term less than life, are suspended by virtue of such sentence. He is *civiliter mortuus* during such time. (1 R. C. 1855, p. 642, § 22.)

Among the civil rights of a person is the right to sue and be sued. (1 Wend., Blk. C., 141; Constitution, art. 13, § 7.)

The effect of such suspension is to place his person under the protection of the law, and his property in the custody of trustees. (R. C. 1855, p. 642, § 23; R. C. 1855, p. 1212, § 2.)

That he was then under sentence would have been a sufficient defence to Wolff had he plead to the original suit; or

would be good ground for enjoining the collection of the debt were an attempt made to enforce it.

Of any such defence, the garnishee can avail himself. (Reagan v. Pacific Railroad, 21 Mo. 30.)

II. Sunday is a "*dies non*" in judicial proceedings. (R. C. 1855, p. 542, § 64, and p. 1586, § 3.)

Appellant being summoned to appear and answer on that day, was not bound to appear on any other, unless again summoned. This was not done.

Wise, for respondent.

I. There is nothing in the record by which the time of service in the original suit against Wolff can be ascertained.

II. If Wolff had any defence by reason of a disability, it belonged to the original suit, and cannot be set up by a garnishee. He cannot inquire into the merits of the original suit, or in any way interfere between the parties.

A judgment cannot be collaterally impeached—3 Dev. R. 242—and is conclusive upon all matters of defence. (Crawford v. Simonton, 7 Port. 110.) Nor can such judgment be impeached in a collateral proceeding tending to show want of jurisdiction by reason of disability of parties, such as infancy. (Boston v. Gates, 4 Dana, 429; State v. Connolly, 6 Ired. 243; Hale v. Heffy, 6 Humph. 444; Smith v. Keene, 26 Maine, 411; Cochran v. Loring, 17 Ohio, 409.)

III. A garnishee cannot inquire into errors between the original parties, nor object, unless the judgment is void on its face. (Pierce v. Carrollton, 12 Ill. 359; Whitehead v. Hearne, 4 Sm. & M. 704; Motley v. Gallaway, 12 Sm. & M. 477; Perpetual Ins. Co. v. Cohen, 9 Mo. 416.)

IV. That the execution was returnable on Sunday was an objection which the garnishee could not raise by motion to dismiss.

DRYDEN, Judge, delivered the opinion of the court.

On the 2d of August, 1856, the plaintiff, Wise, recovered a judgment against one Marcus A. Wolff, before a justice of

the peace, in St. Louis township, in St. Louis county, for ninety dollars for his debt, and for one dollar and twenty-five cents costs. On the 20th of October, 1858, the justice issued an execution on the judgment to the constable of the township, returnable within sixty days from date, on which the constable summoned Hull, as garnishee of Wolff, and made the following return of the execution, viz :

"I could not find any goods or chattels of the defendant whereon to levy and make this debt and costs, or any part thereof, in St. Louis township; but did, by order of plaintiff, garnishee David P. Hull to appear before the within named justice and answer such interrogatories as the justice may propound touching his indebtedness to the within defendant.

"GEO. W. MANNING, Constable,

"By C. W. KENWORTHY, Deputy.

"December 18, 1858."

Hull failing to appear before the justice, judgment by default was rendered against him, which he moved to set aside, and the motion being refused, he appealed to the Law Commissioner's Court. On the case coming into the latter court, Hull filed a motion to dismiss, in these words :

"And at this day comes the said garnishee and moves the court to dismiss said garnishment, for the following reasons, to-wit :

"1. Because the defendant, in the original suit, was at the time of the service upon him a convict and under sentence of imprisonment to the penitentiary, whereby all his civil rights were suspended.

"2. Because the garnishment was made returnable to a '*dies non*,' to-wit, Sunday."

In support of this motion, Hull read the affidavit of a Mr. Decker, who testified substantially that he had examined the records of the United States Circuit Court for the district of Missouri, in which he found that Marcus A. Wolff was there convicted, on or about the 3d of June, 1856, on several indictments of the crime of forgery, and sentenced to imprisonment in the penitentiary for five years. Also, that he had

examined the docket of the justice in the original case, (Wise v. Wolff,) and found that the summons was served on Wolff on the 18th day of July, 1856. Hull also, in further support of the motion, read the transcript and papers filed by the justice in this case. The Law Commissioner overruled the motion to dismiss and the defendant saved his exception; and the garnishee failing further to appear or answer, judgment by default was rendered against him. Three days afterwards he appeared and moved the court "for a review and rehearing of the cause, and for a new trial, for the reasons—

"1. The Court erred in refusing to dismiss said cause.

"2. The court erred in entertaining jurisdiction of said cause."

And this motion being likewise overruled, the defendant appealed to this court.

The last motion raises no point not made in the motion to dismiss, so that if the latter was properly overruled, the judgment must be affirmed, otherwise it must be reversed.

I. Without expressing any opinion upon the question raised by the first ground for dismissal, or upon the question of the sufficiency of the proof offered in support of it, it is enough that the objection could not be reached by motion. The objection assumes that by the civil death of the original debtor, whose credits are attached in the hands of the garnishee, his rights of property have, by operation of law, been divested and transferred to another; or, at least for the time, have become suspended. If the assumption is tenable, then it is such matter as constitutes a ground of defence to the merits or in abatement of the action, and should be presented by plea or answer, and not by motion to be summarily tried by the court without jury.

II. The second ground of the motion to dismiss is that the return day of the garnishment was Sunday. The objection is not sustained by the return of the constable. The return on the writ is materially defective, not in showing that the garnishee was required to appear on Sunday, but in failing

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to show when he was to appear. The return day of a garnishment on execution is the next law day of the justice, (R. C. 1855, p. 965, § 11,) and not the return day of the execution as the defendant seems to suppose.

The objection should have been to the return, in the form of a motion to quash, which would have given the officer an opportunity to amend, and not a motion to dismiss. There was, therefore, no error in overruling the motion.

The judgment of the Law Commissioner's Court will be affirmed, with ten per cent. damages; the other judges concurring.



GEORGE W. CARPENTER *et al.*, Respondents, v. MORRIS D. MEYERS, Appellant.

Suits.—All suits upon bonds, bills or notes are, by sec. 26, Art. VI., Practice Act, R. C. 1855, p. 1235, triable at the return term.

Counter-claim.—The plea of partial failure of consideration of a promissory note does not constitute a counter-claim so as to require a replication.

Error—Continuance.—To warrant the reversal of a judgment for alleged error in overruling a motion for continuance, the record must present a state of facts showing that the discretion of the court has been unsoundly exercised.

Appeal from St. Louis Circuit Court.

M. L. Gray, for appellant.

I. Defendant not having been personally served with process, the case was not triable at the return term. (R. C. 1855, p. 1259, Prac. Act, § 4 & 5.) The general rule by the statute is that all cases shall be continued at the return term, and the 24th, 25th and 26th secs. of Art. 6, p. 1235, changes this rule only in cases where there is personal service in cases of bills, bonds and notes.

Sec. 25 of the Land Court Act of St. Louis county (R. C. 1855, p. 1595) controls this matter, making all cases in St. Louis courts, where there has been fifteen days' *personal service*, triable at the return term.

II. The court should have continued the cause, good grounds having been shown.

III. Defendant was entitled to a default on his counter-claim. It was new matter and a cross claim. (R. C. 1232, § 12; R. C. 1233, § 13, 15 & 16.)

Hitchcock, for respondent.

I. The Practice Act, Art. VI., § 26, R. C. 1855, p. 1235, makes all suits upon *notes for the direct payment of money*, triable at the term at which the defendant is bound to appear, the return term of the writ.

II. The granting a continuance was a matter within the discretion of the court, and to authorize a reversal for the refusal thereof, a plain and palpable case of error must be made out. (*Freleigh v. The State*, 8 Mo. 611.) The record does not show the grounds of the decision.

III. The court rightly refused to grant defendant a judgment for want of replication to his so-called counter-claim. The answer sets up merely a partial failure of consideration.

BAY, Judge, delivered the opinion of the court.

Plaintiffs brought suit against defendant on a promissory note in the St. Louis Court of Common Pleas, returnable to the October term, 1858. The note was for the sum of \$217.69, dated 19th of August, 1857, and made payable to the order of plaintiffs seven months after date. The summons was served on the 16th of September, 1858, by leaving a copy of the writ and petition at the usual place of abode of defendant, with a white person of his family over the age of fifteen years.

The answer alleges that the note was given in consideration of a bill of goods, purchased in the city of New York, to be forwarded to defendant at St. Louis, and that plaintiff neglected to forward a part of said goods of the value of forty-two dollars, which amount defendant asks to be deducted from the face of the note.

The answer sets up a further defence—that after the making of said note plaintiffs assigned for the benefit of their creditors all their property, including said note, and that the assignees are the owners and holders of said note, and alone entitled to collect the same. When the cause was called for trial, defendant asked for a continuance upon the grounds that the cause was not triable at the return term; which application the court refused. A similar application was then made upon the statements of defendant's attorney, plaintiff waiving an affidavit; which was also overruled. Defendant then moved for judgment against plaintiff for the sum of forty-two dollars upon the ground that no replication had been filed to that part of his answer averring the non-delivery of a portion of the goods; which was also overruled. The record presents three propositions for the consideration of this court: 1st. Was the cause triable at the return term? 2. Was the application for a continuance, predicated upon the statement of defendant's attorney, properly overruled? 3d. Does the answer set up matter requiring under our practice a replication?

The 2d and 3d propositions are readily disposed of. The statement of defendant's attorney is predicated almost exclusively upon information imparted to him by his client, and not upon facts within his own knowledge; and if the information so imparted was in all respects true, it still does not show that diligence upon the part of the defendant which would entitle him to a continuance. The bill of exceptions, moreover, does not set out the rule of the court in regard to continuances, and for aught that appears in the record, the application may have been overruled by reason of its non-compliance with such rule in form or substance. To warrant this court in reversing a judgment upon the ground of alleged error in overruling a motion for continuance, the record should show a state of facts which will satisfy us that the discretion lodged in the court below was unsoundly exercised.

The 3d ground of error is without any face. The matter

set up in the answer, which the appellant insists should have been replied to, constitutes simply a plea of partial failure of consideration. The practice act only requires a replication when the answer contains new matter constituting a counter-claim.

The other point, involving the question as to whether the cause was triable at the return term, is attended with more difficulty, not by reason of any ambiguity in the statute, but because of the supposed conflict between the law as it exists, and the intention of the legislature in its enactment as gathered from different sections of the act. The 24th section of the 6th article of the revision of 1855, regulating the practice in civil cases, provides "that when the petition is founded solely upon a bond, bill or note for the direct payment of money or property, and the defendant shall have been personally served with process, he shall demur to or answer the petition on or before the second day of the term at which he is bound to appear, if the term shall so long continue; if not, then within such time in the term as the court shall direct."

The 26th section is as follows: "Suits in cases founded upon such bonds, bills and notes, shall be determined at the term at which the defendant is bound to appear, unless continued for good cause."

The section requiring the defendant to demur, or to answer the petition, on or before the second day of the term, will be found in the revisions of 1835 and 1845, in neither of which were suits on bonds or notes for the direct payment of money or property triable at the first term, unless personal service was had upon the defendant. In a large majority of the counties in the State, the term of the Circuit Court was limited by law to one week, and in many of them the business of the court did not require more than three or four days' session; hence it was important that in cases triable at the return term, the issues should be made up at the earliest practicable period.

The fact that in the revision of 1855 the same provision

respecting the time of pleading is retained, is urged with much plausibility as tending to show that the legislature did not intend to change the rule with regard to the trial term. The argument is by no means destitute of force, for it is difficult to understand why a law should be retained after the reason for its enactment had ceased to exist; but we know from past experience that in the hurry usually attending a revision of the law, many acts remain unrepealed which are of no practical utility whatever.

It is contended by the appellant that the word *such*, in the 26th section of the act of 1855, refers not only to bonds, bills and notes, for the direct payment of money or property, but to suits founded thereon in which personal service has been had upon the defendant. But a glance at the section shows the contrary. The language is "suits in cases founded upon such bonds, bills and notes," evidently referring to bonds, bills and notes *for the direct payment of money or property*.

The 5th section of the act of 1845, entitled "An act for the speedy recovery of debts due on bonds and notes," is as follows: "If the defendant shall have been personally served with process, he shall plead to the merits of the action on or before the second day of the term, &c., and the suit in *such cases* shall be determined at the same term, unless continued for good cause."

Here it will be observed that the language is entirely different from the act of 1855, the word *such* having a totally different application.

In this case the defendant was bound to appear at the return term of the writ, and the act of 1855 makes the term at which he is bound to appear the trial term. Had he neglected to appear at such term, he would have subjected himself to an interlocutory judgment by default, which, in such cases, by the 11th section of the 12th article of the same act, must be proceeded on to final judgment at the same term.

If the act of 1855 was ambiguous, and susceptible of different meanings, resort might be had to the intention of the

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legislature as a means of furnishing a proper construction; but in the absence of any ambiguity we are not at liberty to adopt any such rule of construction, our functions being judicial and not legislative.

We have been referred to the last section of the Land Court act, but do not think it has any important bearing upon the question involved.

With the concurrence of the other judges, the judgment will be affirmed.



THE BANK OF COMMERCE, Respondent, v. ALEXIS MUDD AND
HENRY T. MUDD, Appellants.

Evidence.—The plaintiff claiming to be a corporation by the laws of New York, sued by the name of "The Bank of Commerce." The articles of association produced to prove the plaintiff's right to sue as a corporation declared that the name to be used should be "Bank of Commerce, in New York." *Held*, that the articles offered were not competent evidence to prove the existence of a corporation bearing the name of the plaintiff.

Appeal from St. Louis Court of Common Pleas.

The matters upon which the court pass are sufficiently stated in the opinion, and as only one point is decided, the other questions presented by the counsel are omitted.

Wm. T. Wood, with *S. T. Glover*, for appellants.

I. The court improperly admitted as evidence the articles of association of the stockholders of the Bank of Commerce, because not properly authenticated, and because there was no evidence that the affidavit required by the laws of the State of New York was subscribed and filed. (1 Rev. Stat., N. Y., 597 & 601, § 31, 32, 33, 61.)

Knox & Kellogg, for respondent.

The articles of association read in evidence establish the corporate existence of plaintiff. (Rev. Stat. N. Y. of 1838, p. 245, Ch. 260, & Ch. 185 of Acts of Sess. of 1854, p. 442.)

The note sued on was payable on its face at the Bank of Commerce, New York. This against the defendants is sufficient evidence of the corporate existence of plaintiff. (1 Hall, N. Y., 191; Green. Ev. § 207; 6 N. Hamp. 164; 2 Blackf. 367; 7 Port., Ind., 416; 14 J. R. 245; 2 Mo. 138.) The evidence further shows that plaintiff discounted the note for defendants, who did business and kept a bank account with plaintiff; that defendants wrote letters to the plaintiff both before and after the institution of this suit, recognizing the plaintiff as the Bank of Commerce, all which acts are sufficient evidence against the defendants of the corporate existence of plaintiff.

BATES, Judge, delivered the opinion of the court.

This suit was brought by the Bank of Commerce against the appellants and John J. Mudd, as endorsers of a promissory note. The suit was dismissed as to John J. Mudd, and judgment given against the other two.

The petition stated that the plaintiff was a corporation under and by virtue of the laws of the State of New York, and doing business in the city of New York.

The answer put in issue the existence of the corporation.

At the trial the plaintiff gave in evidence an act of the people of the State of New York, entitled, "An act to authorize the business of banking," passed April 18, 1838, which authorized persons to "associate, to establish offices of discount, deposit and circulation." Such persons were by the act required to make a certificate which should specify, among other things, "the name assumed to distinguish such association, and to be used in its dealings." The 21st section of the act enacted that "all suits, actions and proceedings brought or prosecuted by or on behalf of such association, may be brought or prosecuted in the name of the president thereof."

The plaintiff then offered in evidence a copy of articles of association, purporting to be made under the act of April 18, 1838, to which the defendants objected on the ground of irrelevancy or incompetency.

The first section of the first of said articles of association is as follows: "The name which they assume to distinguish their association, and which shall be used in its dealings, shall be 'Bank of Commerce, in New York.'"

The plaintiff having designated itself in the petition as "The Bank of Commerce," the question arises whether the articles offered in evidence are any evidence of the existence of the plaintiff as a corporation entitled to sue by that name.

The general rule that a corporation is known by its name, is more rigidly enforced when the corporation is a plaintiff and sues by a wrong name, than in questions arising upon grants by or to a corporation, or contracts with it, where there is a variation from the precise name of the corporation.

It is believed, however, that in all cases where a variation from the name has been disregarded, there was no doubt that the corporation was intended by the name used. In this case, however, it would be very difficult for the court to say that a corporation suing by the name of "The Bank of Commerce," and declared to exist under the laws of the State of New York, and doing business in the city of New York, is the same as an association denominating itself "Bank of Commerce," in New York, and which can only sue in the name of its President.

The articles offered in evidence were not competent evidence of the existence of a corporation bearing the name of the plaintiff, and their admission in evidence was an error.

The judgment of the St. Louis Court of Common Pleas is reversed, and cause remanded. Judges Bay and Dryden concur.

HERMAN H. LAUMEIER, Respondent, v. FREDERICK STEINES,
Appellant.

Appeal from Franklin Circuit Court.

Practice.—Judgment affirmed, appellant failing to file transcript.

A. M. & S. H. Gardner, for respondent.

BATES, Judge, delivered the opinion of the court.

In this case an appeal was allowed the defendant by the Circuit Court of Franklin county, on the 15th day of April, 1861; and now at the March term, 1862, the appellant having failed to file a transcript of the record in the office of the clerk of this court, the respondent produces to the court a transcript of the record, (from which it appears that an appeal was granted as above stated,) and moves the court to affirm the judgment of the court below. No good reason being shown why it should not be done, the motion is granted.

Judgment affirmed. Judges Bay and Dryden concur.



JOSHUA W. OWINGS, Respondent, v. JAMES J. MCBRIDE *et al.*,
Appellants.

Appeal from St. Louis Circuit Court.

Practice.—Judgment affirmed with damages, no defence to the suit appearing.

McBride, for appellants.

Lackland, Cline, and *Jameson*, for respondent.

BATES, Judge, delivered the opinion of the court.

This is a suit against McBride, as maker, and Jecko and McDonald, endorsers, of a negotiable promissory note. The suit was dismissed as to McBride, and, upon a trial by the court without a jury, a judgment was given against Jecko and McDonald. No exceptions were taken to anything done at the trial, and the only exception taken in the case is to the overruling their motion for a new trial. The defendants do not appear to have had any defence whatever to the suit.

Judgment affirmed, with ten per cent. damages. Judges Bay and Dryden concur.

STATE, *ex rel.* JOHN K. McDEARMON, v. THE AUDITOR OF PUBLIC ACCOUNTS.

Fees.—The act of January 25, 1861, (Acts 1860-61, p. 31,) in relation to fees, was not repealed by the act of March 28, 1861, (Acts 1860-61, p. 30.)

Application for Mandamus.

Application for a mandamus against William S. Mosely, Auditor Public Accounts, to compel him to audit and allow an account of the relator for making out a copy of the tax book of St. Charles county, for 1861, at the rate of ten cents per hundred words. The auditor appeared and waived the preliminary rule, and the cause was submitted to the court.

Orrick, for relator.

I. The act entitled "An act amendatory of an act to amend 'An act to regulate fees,'" approved March 28, 1861, revived that portion of the original act, approved December 5, 1855, which entitle county clerks to ten cents per hundred words for copying tax lists for the year 1861. (See Acts of 1860-61, p. 30; R. C. 1855, p. 760; Acts of '56-7, p. 63 & 103; act of Dec. 14, 1859, p. 89; act of Jan. 25, 1861, p. 31; Act of March 27, 1861, p. 69.)

Attorney General *Welch*, for respondent.

I. The 6th section of the "Act to regulate fees," approved December 5, 1855, R. C. 1855, p. 760, allowed county clerks *ten cents per hundred words* for making out the tax book.

II. So much of the 6th section of the act of 1855, as regulated the compensation of county clerks for making out the tax books, was repealed by the 6th and 7th sections of Art. VII. of the act of November 23, 1857. (Sess. Acts 1857, Adj. Sess., p. 75; *Harris v. Buffington*, 28 Mo. 53.)

III. Sections 6 and 7 of Article VII. of the act of November 23, 1857, were themselves repealed by the act of December 14, 1859, (Acts 1859-60, p. 89,) but this did not operate

to restore the act of 1855. (R. C. 1855, p. 1021, art. 3, § 1.) Clerks were left without any compensation for this service.

IV. The act of Jan. 25, 1861, (Sess. Acts 1860-1, p. 30,) remedied this oversight, and clerks were allowed *five* cents per hundred words for making out the tax book, and under this act defendant is ready and willing to audit and allow the claim of plaintiff.

V. The act of February 12, 1857, only repealed the 9th and 10th sections of the act of 1855, but this act was partially repealed by the act of March 28, 1861 and the original act of December 5, 1855, was revived and declared to be in full force.

A proper construction of this phraseology is the only matter now in controversy. The fees of the clerk for making out the tax book were not regulated by either the 9th or 10th sections of the act of 1855, but by the 6th section of that act.

The act of February 12, 1857, only repealing two certain sections of the act of 1855—sections 9 and 10—and reviving the act of 1855, can only be construed as reviving the two sections thus repealed. The remainder of the act of 1855 not having been repealed, needed no reviving.

DRYDEN, Judge, delivered the opinion of the court.

This is an application for a mandamus to require Mosely, who is Auditor of Public Accounts, to audit and allow an account for two hundred dollars for the services of McDearmon, who is clerk of the St. Charles County Court, in copying the tax book of 1861 for that county, containing two hundred thousand words and figures. The auditor admits the performance of the services, and is willing to allow for the same the sum of one hundred dollars, which is at the rate of five cents per hundred words; but the clerk demands ten cents per hundred, insisting that is the rate allowed by law for the service.

It is argued by Mr. Orrick, counsel for McDearmon, but controverted by Attorney General Welsh, that the act of 25th January, 1861, (Laws Mo., 1860-61, p. 31,) which give

five cents per hundred words for this service, was repealed by the amendatory act of March 28, 1861, and that the latter act revived the 6th section of the act of December 5, 1855, (R. C. 1855, p. 758,) which prescribes ten cents as the compensation. The question in the case involves the proper construction of the 1st section of the act of March 28, as follows:

“§ 1. That so much of an act entitled ‘An act to amend an act entitled an act to regulate fees,’ approved February 12, 1857, as applies to the clerks of the Circuit Courts, County Courts and Common Pleas Courts of this State, and the clerks of the Criminal Court, Land Court and Law Commissioner’s Court of St. Louis, and the secretary of the Board of County Commissioners of St. Louis county, be and the same is hereby repealed, and the original act, approved February 5, 1855, to which said act is amendatory, is hereby revived and declared to be in full force.” (Laws of Mo., 1861, p. 30.)

The last paragraph of the section taken by itself would justify the proposition of Mr. Orrick, that the whole of the act of December 5, including the 6th section, was intended to be revived and put in force; and if so, it being repugnant to, repealed the act of January 25; but this position is met and overturned by the words of the repealing branch of the section which declares “that so *much* of an act, &c., as applies to certain clerks “is hereby repealed,” leaving the irresistible inference that some part of the law affected by the repealing act was meant to remain in force. The 9th and 10th sections of the law of December 5, (*not December 6,*) which prescribed the fees of clerks of the Supreme Court, Circuit Court, &c., for services *in civil actions*, were repealed by the act of February 12, 1857, and a new table for fees for the same services was established by the last named act. (Laws of Mo. 1856-7, p. 63.) The whole purpose and scope of the act under consideration was to abolish this table of fees, except so far as it related to clerks of the Supreme Court, and in lieu thereof to re-adopt the table prescribed

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in the 9th and 10th sections before repealed, and not to revive the 6th section, which related to a totally different kind of service—*county business*—and which was evidently not in the mind of the legislature. The act of January 25, then, was not repealed, but was the law governing the compensation for the services claimed.

Mandamus refused, the other judges concurring.



CHITLICK MORTLAND, Respondent, v. WILLIAM C. SMITH,
Appellant.

Damages.—In an action against an officer for carelessly taking insolvent securities to a bond for the return of personal property taken and delivered by order of a court, the officer is liable only for the damages actually sustained by the party, and not for the amount of the judgment recovered against the principal on the bond in the original suit. Where the defendant in the original suit claimed to retain possession as security for the freight and charges upon the property taken, he could not recover against the officer if the amount of his claim had been paid him.

Evidence.—In an action against an officer for neglect of duty in taking a delivery bond, the record of the judgment in the suit in which the bond was taken will be evidence against the officer that said judgment had been rendered, but not of the amount of damage sustained.

Appeal from St. Louis Circuit Court.

A. M. & S. H. Gardner, for appellant.

The fifth instruction, asked by defendant's counsel and refused by the court below, was supported and warranted by the evidence, and ought to have been given. It simply submitted to the jury the proposition that if the respondent and his opponent in the original case had settled the matter in controversy, and respondent had been once paid for all his interest in the staves, then he could not claim in this action to recover the value of the staves from appellant.

J. M. Krum, for respondent.

BATES, Judge, delivered the opinion of the court.

A suit was brought in the St. Louis Law Commissioner's Court for the recovery of personal property, by Graham against Mortland, the plaintiff in this suit.

Bond was given by the plaintiff in that suit and the property taken by the marshal of St. Louis county, (the present defendant, Smith,) and delivered to Graham. Graham suffered non-suit, and judgment was rendered against him and his securities in the bond. Execution was issued and returned *nulla bona*.

The present plaintiff then brings this suit against the marshal, Smith, charging that he took said bond carelessly, negligently, and without due inquiry as to the solvency and responsibility of said securities; and did not require them to make oath as to their solvency or responsibility. The plaintiff averred that, by means of the carelessness and negligence of the defendant in taking said bond, he had wholly lost said property and the value thereof, and his costs and charges in said suit, and asked judgment for the damages so sustained.

At the trial, the court properly instructed the jury as to the general liability of the defendant, but erred in refusing an instruction having reference to the amount of damages to be recovered. There was evidence given that the parties to the original suit, before judgment therein, had made an agreement under which the plaintiff paid the defendant a sum of money, and the defendant voluntarily gave up the property (staves) to the plaintiff. The defendant thereupon asked the court to give to the jury this instruction:

"If the jury find from the evidence that, after the execution of the order of delivery for the property in question, an agreement was made between the plaintiff in this suit and Thomas Graham, that, if said Graham would pay the freight and charges on the staves in question, he, said Graham, could have them; and that under said arrangement said Graham did pay said freight and charges, and received said staves, then plaintiff cannot recover for the value of said staves."

The defendant is only liable for the damage actually sus-

tained by the plaintiff; and if he really had not lost the staves and their value, he could not recover on account of them. The instruction should have been given.

The judgment rendered in the original case was evidence against defendant that such judgment had been rendered; but was not evidence against him of the amount of damage sustained by the plaintiff.

In the court below, judgment having been given against the defendant, it will be reversed and the cause remanded.

Judges Bay and Dryden concur.



JOEL W. NORCROSS *et al.*, Appellants, v. HENRY HUDSON,
Respondent.

Evidence.—Records are evidence for or against those only who are parties or privies thereto. Upon an issue upon a plea in abatement in an attachment, it was erroneous to permit the defendant to read in evidence the record of suits between other parties, involving the validity of a conveyance made by the defendant, alleged to have been fraudulent.

Appeal from St. Louis Circuit Court.

The facts are stated in the opinion of the court.

Smith & Sedgwick, for appellants.

I. The judgments offered in evidence were not competent evidence. It was intended to make the jury believe, that because Hayden was able to sustain his title to the property, therefore the intent of Hayden was not fraudulent.

Voorhis, for respondent.

I. The records were properly admitted in evidence, for they were used only to prove that verdicts were given in those cases as collateral facts. (1 Greenl. Ev., § 572, 538, 539.)

The cases were in the same court, and all upon the same issue, to-wit, fraud in the sale.

BAY, Judge, delivered the opinion of the court.

Plaintiffs sued out of the Circuit Court a writ of attachment, predicated upon an affidavit charging defendant with having fraudulently conveyed or assigned his property or effects, so as to hinder or delay his creditors. The property attached consisted of goods in store of defendant, on Market street. At the return term, the defendant filed a plea in the nature of a plea in abatement, putting in issue the truth of the affidavit, which issue was found for the defendant; whereupon the court dismissed the suit. A motion for a new trial was made in due time and overruled. It does not appear from the bill of exceptions that any instructions were given or refused. The only question, therefore, raised by the record, relates to the admissibility of evidence.

The defendant read in evidence to the jury the records of three several suits brought in the Circuit Court by William W. Hayden against Smith, Sedgwick et al., under bonds of indemnity, given under the provisions of "An act concerning the duties of sheriff and marshal in the county of St. Louis," approved March 3, 1855, in which Hayden obtained judgment. Some time prior to the institution of these suits, judgment had been obtained before a justice of the peace against Hudson, upon which executions issued, and to satisfy which the constable levied upon certain goods in the store and possession of Hudson. Hayden claimed the goods by virtue of an alleged sale from Hudson, as evidenced by a bill of sale executed by Hudson bearing date March 3, 1858, and embracing the property in controversy. Due notice of the claim was given to the constable, whereupon the plaintiffs in execution gave bonds, as is required by said act, and the property was sold to satisfy the executions. Hayden brought suits on the bonds, and the only question involved was as to the validity of said bill of sale, the defendants contending that it was void, having been executed with an intent to defraud, hinder and delay the creditors of Hudson.

The jury found in three cases for Hayden, virtually negating all idea of fraud in the bill of sale, and the records of

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these cases were read in evidence by defendant upon the trial of the issue in this case tendered by the plea in abatement. The decision of the court below in permitting said records to be read in evidence, is assigned as error. In our opinion they were inadmissible for any purpose whatever. The object of the defendant undoubtedly was to parade before the jury, with a view to influence their judgment, the fact that three juries in separate cases, and on different occasions, had declared in favor of the validity of said alleged sale. It is proper here to remark that the plaintiffs in this suit relied upon fraud in the bill of sale to maintain the attachment.

These records were in no sense relevant to the issue, nor were Norcross and Sargent privy thereto, not being parties of record. The only end, therefore, which could possibly be attained by their introduction was to prejudice the jury against the plaintiffs. It will, moreover, appear from an examination of these records that Hudson was a material witness for Hayden; and now to permit him to derive any benefit from verdicts which his evidence largely contributed to make, would not only be manifestly unjust, but a violation of that universal rule of evidence which precludes a party from testifying in his own behalf.

The other judges concurring, the judgment will be reversed and the cause remanded.



WILLIAM ROGERS, ADMINISTRATOR OF BALDRIDGE, Respondent,
v. ALFRED W. BAILY, Appellant.

Appeal from Marion Circuit Court.

Practice.—Judgment for failing to file transcript.

BATES, Judge, delivered the opinion of the court.

An appeal was allowed in this case on the 19th day of March, 1858, by the Marion Circuit Court. Now, at the March term, 1862, the appellant having failed to file a tran-

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script of the record, the administrator of the respondent appears and produces a transcript of the record and proceedings in the cause, and suggests the death of said Baldrige, and moves that he be substituted for said Baldrige as respondent, and that the judgment of the court below be affirmed; all of which is granted.

Judge Bay concurs; Judge Dryden did not sit in the cause, having been of counsel in the court below.

JOHN C. IVORY, Respondent, v. JOHN M. PEARSON *et al.*, Appellants.

Practice.—Judgment for failure to assign error.

Appeal from St. Louis Circuit Court.

Lackland, Cline & Jameson, for appellants.

Garesché, for respondent.

BATES, Judge, delivered the opinion of the court.

The respondent having moved for an affirmance of the judgment for want of an assignment of errors, and no good cause being shown to the contrary, it appears that he is entitled to the affirmance.

Judgment affirmed. Judges Bay and Dryden concur.

ALEXANDER J. P. GARESCHÉ, Respondent, v. PATRICK MULLOY, Appellant.

Practice.—Judgment affirmed for failure to file transcript of record.

Appeal from St. Louis Law Commissioner's Court.

C. D. Colman, for appellant.

W. H. Lackland, for respondent.

BATES, Judge, delivered the opinion of the court.

At the March term, 1862, of this court the respondent produces in court a transcript of the record and proceedings in the cause, and it appears thereby that an appeal was allowed in the cause more than thirty days before the beginning of this term, that is, on the twenty-ninth day of March, 1861, and no transcript has been filed by the appellant in the office of the clerk of the court. The respondent moves for an affirmance of the judgment; it is right.

Judgment affirmed. Judges Bay and Dryden concur.



JOHN L. BERNICKER, &c., Defendants in Error, v. FREDERICK
CLAUS, &c., Plaintiffs in Error.

Practice.—Judgment affirmed for failure to assign errors.

Error to St. Louis Court of Common Pleas.

A. W. & S. H. Gardner, for defendants in error.

Kribben & Kehr, for plaintiffs in error.

BATES, Judge, delivered the opinion of the court.

In this case the transcript of the record was filed in the office of the clerk of this court on the 1st day of March, 1862. Causes from the same Circuit (St. Louis) were set for hearing on the first day of this term, March 17. On the 9th day of May, in this term, the plaintiffs in error having filed no assignment of errors, the defendants in error, for that reason, move the court to affirm the judgment. No cause to the contrary being shown, the motion is granted.

Judgment affirmed. Judges Bay and Dryden concur.

State, to use of Buhr, v. Spaunhorst.—Pottle and Bayley v. Harless.

STATE, TO USE OF FRED. BUHR, Respondent, v. HENRY J.
SPAUNHORST *et al.*, Appellants.

Practice.—Judgment for failure to assign errors.

Appeal from St. Louis Court of Common Pleas.

Kribben & Kehr, for respondents.

Kellam, for appellants.

BATES, Judge, delivered the opinion of the court.

The respondent moves the court for an affirmance of the judgment in this case, because errors have not been assigned as required by law. He is entitled to the affirmance.

Judgment affirmed. Judges Bay and Dryden concur.



MOSES L. POTTLE AND ROMAN L. BAYLEY, Respondents, v.
ADOLPH HARLESS, Appellant.

Appeal from St. Louis Land Court.

John N. Stratt, for appellant.

Garesché and Farish, for respondent.

BATES, Judge, delivered the opinion of the court.

This suit was brought originally before a justice of the peace, and an appeal from the justice to the St. Louis Land Court was tried there by the court without a jury. No declarations of law were asked by either party or given by the court. The defendant (appellant) objected to some evidence given by the plaintiff, but the objection is only stated generally in the bill of exceptions, without the ground of it being stated.

Judgment affirmed. Judges Bay and Dryden concur.

ARCHIBALD CARR, Respondent, v. MARTIN BURKE *et al.*,
Appellants.

Boats and Vessels—Power of Master.—The master of a boat in the home port has no authority as master to give bond and procure security for the discharge of the boat under the 14th section of the act relating to boats and vessels, (R. C. 1855, p. 307,) so as to bind the owners to reimburse the security for such sums as he may be compelled to pay. He is not the agent of the owners for such a purpose, and they will not be liable unless they recognize or ratify his acts in some manner.

Boats—Power of Master.—The master of a steamboat may, in the home port, in his capacity of agent, employ persons to serve on the boat, and contract for the necessary stores and supplies.

Contract—Privity.—Where a steamboat was attached, in her home port, under the statute for a breach of a contract of affreightment, and the master procured a security to unite with him in giving bond to procure the discharge of the boat, and judgment was rendered against the master and security, the security was compelled to pay the judgment; *Held*, that the security could not recover as for money paid and expended against the enrolled owners, without showing that he became security at their request, or that they ratified the acts of the master, or that there was some privity of contract either in fact or in law.

Bates, Judge, dissenting.

Appeal from St. Louis Court of Common Pleas.

The facts are sufficiently stated in the opinion, excepting that at the trial the defendants offered testimony to prove that Robert A. Reilly was the real owner and manager of the boat, and that he employed the master, the defendants having no management or control of the boat, being trustees only.

The court gave the following instruction at plaintiff's request, defendants excepting:

"Notwithstanding the jury may believe from the evidence, that the steamboat Michigan was at the time of the giving of the bond read in evidence run for the benefit of Robert A. Reilly, yet if they shall also believe that the defendants at the time held the title to said steamboat from Reilly in trust for his benefit, then the defendants are to be taken as the real owners of the boat, and are liable as such."

Defendants asked the following instructions, which were refused, defendants excepting :

"The plaintiff is not entitled to recover in this action, unless he has shown in evidence, to the satisfaction of the jury, that the defendants requested the plaintiff to become security upon the bond mentioned in his petition, and that unless such request is shown in evidence to the satisfaction of the jury, they should find for the defendants.

"If the jury find from the evidence that, at the time the bond read in evidence by the plaintiff was made, the steamboat Michigan was being navigated and run by Robert A. Reilly, and for his benefit exclusively ; that said Reilly employed Captain E. A. Sheble to act as captain and master of said boat at the time said bond was made, if said Captain Sheble, while so employed, entered into said bond, and procured the plaintiff to become security on said bond, then the plaintiff cannot recover in this action unless the plaintiff has shown in evidence, to the satisfaction of the jury, that the defendants requested the plaintiff to become security on said bond."

The other instructions were variations of the above.

F. C. Sharp and *C. S. Hayden*, for appellants.

I. The instruction asked by plaintiff, at the close of plaintiff's case, should have been given. No *special* authority of the master was shown, and the master as such is not the agent of the owners for the purpose of procuring security on a bond, in the home port, when the owners may be consulted. The master is agent of the owners only, relating to the ordinary employment of the vessel as a vessel. (Abbott on Ship. 134 ; Parsons on Mar. Law, 380.) He cannot bind the boat for wages, (28 Mo. 347,) nor by bill of exchange, (25 Mo. 99 ; 10 Metc. 375,) nor procure insurance, (11 Pick. 85 ; 7 B. Mon. 595,) and many cases hold that in the home port he cannot bind the owners even for supplies. (6 Mees. & W. 380, 381 ; 37 Maine, 276.)

II. The only evidence of ownership in defendants was the enrolment, although our statute makes this *prima facie* evidence of ownership; it does not prove nor raise the presumption that the master was the agent of the persons named as owners in the enrolment. The fact of agency must be proved like any other fact. (15 J. R. 298; 4 Pick. 458; 4 Watts & S. 240; 23 Penn. 76; 2 Gill, 393; 33 E. L. & Eq. R. 204; 34 id. 486; 36 id. 380.)

Hart & McGibbon, for respondent.

The title appearing by the enrolment to be in the defendants, parol proof was not admissible to show it to be in Reilly, or that they were only trustees for him. There was no proof that the plaintiff knew that defendants held the title in trust for Reilly, and he was not bound to look beyond the legal title in this suit.

The master, Sheble, had authority by the statute to pledge the credit of the owners for the release of the boat. (R. C. 1855, p. 307; *Clark v. Humphreys*, 25 Mo. 99; *Abbott on Ship.*, 8th ed., 94, 112, and cases referred to; *United States v. Johnson*, 4 Dal. 412.)

BAY, Judge, delivered the opinion of the court.

In the year 1855, Lucien Carr and Alexander S. Buchanan brought suit in the Court of Common Pleas against the steamboat Michigan upon an alleged contract of affreightment, and caused said boat to be seized under our statute relating to boats and vessels. Sheble, the master of the boat, procured her release, by giving bond as provided by the 14th section of said act, and, at his instance and request, the plaintiff in this suit became security in the bond. Judgment was rendered against Sheble and his security, which was paid by the security upon execution; and this suit was brought against the defendants, as owners of the boat, to recover the amount so paid. Judgment being given against them, they appeal so this court.

Upon the trial of the cause the plaintiff read in evidence a certified copy of the enrolment of the boat in the custom-house at St. Louis, in which the names of defendants appear as owners. Also, the record and proceedings in the case of Carr and Buchanan against the boat, together with the bond upon which she was released. It was also shown that the security paid on the execution, the amount of judgment, interest and costs, making in the aggregate the sum of three hundred and fifty dollars and ninety-seven cents. There was no evidence tending to show that defendants caused plaintiff to become security in the bond, or even knew that the boat had been seized. There was, in fact, no evidence, outside of the enrolment of the boat, connecting the defendants in anywise with the transaction. They did not participate in the defence of the Carr and Buchanan suit. The transaction was managed and controlled exclusively by the master. The liability of the defendants is attempted to be fixed upon the sole fact that they were the owners of the boat, and the court below upon this theory, and assuming this to be the law, gave the instructions asked for by plaintiff, and refused those asked by defendants.

It is not questioned that, as a general rule, the master of a vessel is the agent of the owners, and can by his acts in many respects bind the owners; but his power arising under such agency is largely restricted, and subject to numerous limitations. All contracts made by him for wages of seamen and for supplies, reasonable and necessary, will bind the owners, particularly if made in a foreign port. If the vessel be in a foreign port, the master can bind the owners by many acts which in a home port would be outside of the scope of his authority, and, therefore, imposing no liability upon them.

This distinction is well laid down in the books, and exists from necessity, for it is presumed that in a foreign port the owners cannot exercise that supervision over the vessel which may be necessary for her safety and the success of the voyage. A large latitude is, therefore, given to the power and authority of the master as agent of the owners. Thus, in

Thomas v. Osborne, 19 How., p. 22, the Supreme Court of the United States say that the master of a vessel of the United States, being in a foreign port, has power in case of necessity to hypothecate the vessel, and also to bind himself and the owners personally for repairs and supplies; and he does so without any express hypothecation when, in a case of necessity, he obtains them on the credit of the vessel without bottomry bond. "The limitations of the authority of the master to cases of necessity, not only of repairs and supplies, but of credit to obtain them, and the requirement that the lender or furnisher should see to it, *that apparently such a case of necessity exists*, are as ancient and well established as the authority itself."

So in case of Milward v. Hallett, 2 Cranch. 77, the same court held, that if the master, in the course of the voyage, is compelled to pay duties in order to obtain a clearance of the cargo, or freight, he may bind the ship owner to the payment.

These cases rest upon the principle of necessity, but in the absence of such necessity the law is otherwise. When the owner is himself present, or within easy access, that agency of the master, which is founded on necessity, disappears, for the necessity has ceased to exist. (1 Parsnos on Mar. Law, 380.)

Thus it is held that a master of a vessel has no right, merely as master, to procure insurance for the owners, nor can one tenant in common of a vessel, merely in virtue of such relation, cause insurance to be made on property on board for his co-tenant. (Foster et al. v. United States Ins. Co., 11 Pick. 85; Bell v. Humphreys, 2 Stark. 345.)

In Jordan v. Young, 37 Maine, 276, the Supreme Court of Maine went so far as to hold that the master in a home port could not order repairs to be made. The judge, in delivering the opinion, said:

"The master of the vessel can do all things necessary for the prosecution of the voyage. But this authority does not usually extend to cases where the owner can personally

intefere, as in the home port. If the vessel be at a home port, but at a distance from the owner's residence, and provisions or other things required to be provided promptly, then the occasion authorizes the master to pledge the credit of the owner. There is nothing in the present case to indicate an exigency so pressing as to preclude an application to the owner before the repairs were made, and the master, merely as such, could not make the owner liable for them."

In the navigation of our western rivers the strict rules of maritime law have never been so rigidly enforced. Here it is admitted that the master, in his capacity of agent, may, even in the home port and where the owner resides, employ persons to serve on the boat, and may contract for stores and supplies; and, to give still greater security to this class of claims, the legislature have provided that they shall constitute a lien upon the boat itself.

But the master has no power to execute a note in the name of the owner payable to the pilot for wages due him, the authority for such purpose not being implied from the relation that subsists between master and owner. (*Grigg v. Robbins*, 28 Mo. 347.)

We have been particular in noting the distinction between contracts of the master made in a foreign port and those in a home port, for the reason that it has a special application to the case under consideration. Here the boat was seized in the port of St. Louis, her home port, and the place of defendant's residence. No necessity existed for any particular action on the part of the master. The owners were on the ground, and could have given the statutory bond if they desired her discharge, or, if the master thought proper to execute the bond in his own name, he could have called upon the owners to furnish the security. It is true that our statute provides that the boat shall be discharged if the captain, owner, agent or consignee shall give the bond required; but it is not a duty imposed on either, and it does not necessarily follow that if the captain or consignee shall volunteer a bond, the person who shall, at the request and by the procurement

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of such captain or consignee, execute the same as security, shall have a cause of action against the owner to reimburse him for any loss he may sustain thereby.

To create such a liability there must be some privity between them, either in fact or in law. There should be evidence to show that the security executed the bond through the instrumentality of the owners, or that the owners subsequently ratified or acquiesced in the same. The record furnishes no such evidence in this case. It does not even appear that the plaintiff knew the owners, or had any knowledge of their responsibility. He evidently executed the bond at the instance and upon the faith and sole credit of the master. If the relation of debtor and creditor was created between the parties, then it must be upon the idea that the master procured the security as agent of the defendants; but no such agency was shown, and we do not think it can be implied from the relation existing between them. The case of *Tom v. Goodrich et al.*, reported in 2 Johnson, 213, maintains the view we take in this case with respect to privity. One of five partners executed bonds to the United States for duties on goods imported on account of their firm and as their property. Tom became security in the bonds and paid them, the co-partner who executed the bonds having died. Tom brought suit against the surviving partners to recover the amount so paid, and it was held that he was not entitled to recover, there being no privity between the parties but what arises from the bond.

Kent, Ch. J., remarked, "It would be refining upon the doctrine of implied assumpsits, and going beyond every case, to consider the surety in a bond as having by that act a remedy at law against other persons for whom the principal in the bond may have acted as trustee." This authority is directly in point. No question could be raised as to the authority of the partner to give the bonds, and it is evident that they were executed in satisfaction of a debt due from the firm for duties on property belonging to the firm, and the surviving partners received and enjoyed an immediate

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benefit from the transaction. If, therefore, no such privity existed between Tom and the surviving partners as to create a legal liability, we do not see upon what principle it can be contended that such privity exists between the parties to this suit. We think it cannot be founded upon any well-settled principle of law.

The judgment will be reversed and the cause remanded; Judge Dryden concurring, Judge Bates dissenting.



JACOB H. EINER *et al.*, Respondents, v. WILLIAM BESTE *et al.*,
and JOSEPH DEYNOD, INTERPLEADER, Appellants.

Conflict of Laws—Sale—Assignment—Insolvent.—The bankrupt and insolvent laws of each State or nation bind and affect their own citizens, and as against them will be enforced by the courts of other States when questions arise as to the title conveyed under such laws. Therefore, where plaintiffs and defendants were citizens of Louisiana, and the defendants had made an assignment of their property in accordance with the laws of that State for the benefit of their creditors, and a syndic or assignee had been appointed to collect and distribute the assets of the insolvents, one of the creditors, a citizen of, and residing in that State, cannot secure a preference over the remaining creditors in his own State by process of attachment against the property and assets of the insolvents in this State. As against such attachment, the title of the assignee of the insolvents will prevail.

Appeal from St. Louis Circuit Court.

The facts are fully stated in the opinion of the court.

The following are the instructions asked by the interpleader and refused by the court:

1. The court declares the law to be, that a foreign assignment will operate wherever personal property of the assignor is found, according to the law of the assignor's domicile, except as against the citizens of the State in which such property may be found.

2. The court declares the law to be, that if it has been established by the evidence that the plaintiffs and defendants were, at the time of the institution of the writ of attachment by Einer and Tredenthal against Beste and Grima, domicil-

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iated at New Orleans, Louisiana, and that the debts—the subject matter of the attachment suit—were there contracted, plaintiffs cannot, by a suit in the courts of Missouri, in regard to the personal property of their debtors in this State, obtain a preference over the other creditors, of which they would be debarred by the laws of Louisiana.

3. The court declares the law to be, that if it has been established in proof that the plaintiffs and the defendants in this suit were, at the time of the institution of this suit, residents of New Orleans; that the subject matter of the suit were debts contracted in New Orleans; that plaintiffs had notice of the proceedings instituted in the courts of New Orleans by William Beste, one of the defendants, against his creditors, and whereby Joseph Deynood, interpleader herein, was appointed syndic, and that by the laws of the State of Louisiana, from the date of such proceedings by Beste against his creditors, all proceedings by the creditors against the personal property of the debtor were suspended, then the interpleader is entitled to recover.

A. J. P. Garesché, for defendants, Beste & Grima.

The parties agree that errors may be assigned as if upon writ of error in the original suit.

I. The answer of the defendants showed a good defence, and the court erred in striking it out. (Sto. Conf. L., § 331-5, p. 560, and § 338, p. 567; 3 Sto. Com. Const. 255, § 1384; Pars. Merc. L. 316; *Hempstead v. Reeve*, 6 Conn. 491; *Donnelly v. Corbitt*, 7 N. Y., 1 Seld., 504; *Brown v. Collins*, 41 N. H. 405; *Stevens v. Norris*, 10 Foster, N. H., 470; *Tibbatts v. Stone*, 26 Me. 112; *Very v. McHenry*, 29 Me. 206; *Bailey v. Deale*, 1 Harring. 367; *Tabor v. Howard*, 5 Harring. 42; *Babcock v. Weston*, 1 Galli. 168; *Betts v. Bagley*, 12 Pick. 580; *McKeim v. Marshall*, 1 Har. & J. 101; *Williams v. Guignard*, 2 How., Miss., 722.)

II. As to the objection that it is *lis pendens* in the courts of another State, see *Boxley v. Dinah*, 16 Penn. 242; *Bowles v. Bowley*, 41 Me. 548.

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A. J. P. Garesché, for interpleader.

I. An application under the insolvent laws of Louisiana may be voluntary or involuntary. (Civil Code, art. 2168.)

After a cession, the property of the debtor cannot be seized or attached. The creditors cannot refuse the surrender, and by a consent of a majority the debtor can be discharged. (Civ. Code, art. 1271, 1272, 1273, 1274.) As to the effect of the *cessio bonorum*, see *Elmes v. Estevan*, 1 Mart. 193; *David v. Hearn*, 1 Mart. 207; *Bermudez v. Ibañez*, 3 Mart. 40; *Cox v. Zeringue*, 4 Mart. 264; *Menard v. Pierce*, 3 Mart., N. S., 375; *Clark v. Oliver*, 4 Mart., N. S., 625; 6 Mart., N. S., 416.)

II. The surrender transfers the property as completely as any other mode of alienation. (*Schroeder v. Nicholson*, 2 La. 354; *Muse v. Yarborough*, 11 La. 531; *Levy v. Jacobs*, 12 La. 109; *Baldwin v. Union Ins. Co.* 2 Rob., La., 138; *West v. His Creditors*, 8 Rob., La., 123; *Lawrence v. Gries*, 9 Rob., La., 219; *Smalley v. His Creditors*, 3 La. 387; *Dwight v. Simon*, 4 La., An., 490; *Rivas et al. v. Hunstock*, 2 Rob., La., 187; *Slidell v. Pritchard*, 5 Rob., La., 101; *Bethany v. His Creditors*, 7 Rob., La., 61.)

III. The assignee is entitled to sue in our courts. The decisions of the common law courts, under the English bankrupt law, do not apply to the insolvent laws of a sister State. (*Mulliken v. Aughinbaugh*, 1 Penn., Pen. & W., 117; *Lamb v. Fries*, 2 Penn. 83; *Blane v. Drummond*, 1 Brock., Ct. Ct., 71; *Hooper v. Tuckerman*, 3 Sand., S. C., 317; *Hoyt v. Thompson*, 5 N. Y., 1 Seld., and S. C. 19 N. Y. 226; *Sto. Conf. L.* 692, § 420.)

IV. The proceedings in New Orleans operated as a transfer of the personal property here as against an attaching creditor of Louisiana, and the claim of the assignee is superior. (*Sto. Conf. L.* 664, § 398, § 383; *Ang. on Ass.* 65; *Burr. Ass.* 362, 2d ed.; *Black v. Zacharie*, 3 How. 14; *Van Buskirk v. Hartford*, 14 Conn. 587; *Hayden's Appeal*, 7 N. Hamp. 502; *Sanderson v. Bradford's Tr.*, 10 N. H. 265; *Hall v. Board-*

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man's Tr., 14 N. H. 38; Warne et al. v. Morrison, 25 Vt. 601; Russell v. Tunno et al., 11 Rich., S. C., 303; Long v. Hammond, 40 Me. 211; Gardner v. Lewis, 7 Gill, 377; Wilson v. Carson, 12 Md. 77; Frazier v. Frederick, 4 Zabriskee, N. J., 166; Benedict v. Parmenter, 13 Gray, Mass., 89; Richardson v. Forepaugh, 7 Gray, Mass., 546; Lowry v. Hall, 2 Watts & Serg. 130; Speed v. May, 17 Penn. 94; Law v. Mills, 18 Penn. 185.)

V. The objection that only one partner petitioned might perhaps be a good objection if made in a Louisiana court; but if not made there, it is waived here. (Long v. Hammond, 40 Me. 211.)

McClelland, Moody & Hillyer, for respondents.

I. The proceedings in Louisiana could have no extra territorial force, although Einer & Co. were domiciled in that State and had knowledge of the proceedings and of the appointment of a syndic.

By the constitution of the United States, art. IV., sec. 2, Einer & Co., citizens of Louisiana, have the same status in the courts of Missouri that they would have if citizens of Missouri. Aside from this and the other stipulations constituting the Union, the States are, as to each other, foreign countries, and their respective citizens only alien friends. The legislation of one State has, and can have, no force as to property in another. This question is not so much between citizens of Louisiana as between the law of that State and the courts of Missouri.

As to the legal effect of an administration granted in another State, see Goodwin v. Jones, 3 Mass. 513; 11 Mass. 313.

II. Deynood, the syndic, could not have sued the garnishee here, even if Einer & Co. had not sued. He has no greater rights as interpleader than he would have as original plaintiff in a suit against the garnishee, Thompson. (11 Mass. 24; 9 Mass. 323; 13 Mass. 145.)

III. The syndic has no greater rights than as a foreign

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assignee of a foreign bankrupt. (Milne v. Moreton, 6 Binn. 353; Holmes v. Remsen, 20 John. 229, 264; Blake v. Williams, 6 Pick. 286; Harrison v. Steny, 5 Cranch, 289; 2 Kaime's Eq. 382; Ogden v. Saunders, 12 Wheat. 213, 362; Oakley v. Bennett, 11 How. 33; Sto. Conf. L., § 415, 388.)

This case was substantially decided in Bryan v. Brisbin, 26 Mo. 423.

IV. The proceedings in Louisiana were by one of the firm of Beste & Grima against the other and the creditors. One partner cannot, by a voluntary assignment, transfer the partnership assets, much less can he by an assignment by operation of law.

BAY, Judge, delivered the opinion of the court.

Plaintiffs sued defendants by attachment in the St. Louis Circuit Court, returnable to the September term, 1858, predicated upon an affidavit alleging that defendants were non-residents. A debt due defendants from a third party, in the city of St. Louis, was attached and said party summoned as garnishee. Defendants, in their answer, aver that at the time of the institution of this suit, and at the time the debt sued on was contracted, both plaintiffs and defendants were, and still are, residents of the State of Louisiana, and that the debt was contracted in the State of Louisiana. That, by the laws of said State, plaintiffs could not maintain their action for the recovery of said debt, because said defendants were insolvent, and had, before the institution of this suit, instituted proceedings in a court of competent jurisdiction in the city of New Orleans for their discharge under the insolvent laws of that State, which proceedings were still pending and undetermined.

Joseph Deynood interpleaded in the cause, claiming the property attached as the legal owner and proprietor thereof, by virtue of his appointment as syndic (a word used in the French law, answering to our word assignee) of defendants.

On motion of plaintiffs, the court below struck out the answer of the defendants. The plaintiffs, in their answer to the

interplea, deny that Deynood is the owner of the property attached, and aver a want of any knowledge or information sufficient to form a belief as to whether he had been appointed in due form of law, syndic, as stated in the interplea. And upon these issues the parties proceeded to trial, a default in the meantime having been taken against the defendants. The case was tried by the court, sitting as a jury, and judgment given against the interpleader, to reverse which he appeals to this court.

Upon the trial it was admitted that all the parties except the garnishee were residents of Louisiana, and that the debt sued on was contracted in Louisiana. It also appeared in evidence that plaintiffs had notice, before the institution of their suit, of the proceedings in bankruptcy, a transcript of which was also read in evidence. By the laws of Louisiana relating to bankruptcy the syndic is selected and appointed by the creditors, who, for that purpose, meet at a time and place specified in the order of the court. The Code defines with much particularity the powers and duties of the syndic; and after declaring that the property of the debtor shall not be liable to be seized, attached, taken or levied on by virtue of any writ of seizure, attachment or execution issued against such property, provides that the syndic shall take possession of and be entitled to claim and recover such property, and to administer and sell the same. It further declares that the surrender shall operate to discharge the debtor from all personal restraint, and to suspend all kinds of judicial process against him. Other articles of the Code are incorporated in the bill of exceptions, but it is deemed unnecessary for the purposes of this case to make any special reference to them.

The question raised by the record in this case is, whether the proceeding in bankruptcy so vested the property and effects in Missouri in the syndic as to defeat an attaching creditor residing in the State of Louisiana, but suing in the courts of Missouri.

The defendants asked several instructions contending for

the affirmative of this proposition, which the court refused to give, assuming the converse of it to be true.

The general rule that personal property has no location, but follows, as to its disposition and transfer, the law of the domicile of the owner, is universally admitted, but the rule is subject to several exceptions. It will not prevail in cases where its application would be prejudicial to the State where the property is found, or the just rights of its citizens, nor has its application been admitted in all cases of voluntary assignments for the benefit of creditors; for, when in such cases a contest has arisen between the assignee and an attaching creditor in another State seeking to avail himself of the property of the debtor in such State, the courts have generally favored the attaching creditor, upon the principle that it is the duty of the State to protect its citizens with reference to property within its jurisdiction. Nor does the rule apply, except as hereinafter stated, to cases of involuntary assignments under bankrupt laws. In England, it is true, it has been uniformly held that the operation of bankrupt laws is to vest in the assignees all the personal property of the bankrupt wherever it may be situate, and consequently that an attachment and recovery of such property made by a creditor in a foreign country after such assignment is inoperative, upon the principle that the title which is prior in point of time ought to obtain preference in point of right and law. (Story on Conflict of Laws, 408; 4 T. R., 192.)

But in this country the adjudications have been otherwise; and although we have permitted in some instances assignees of bankrupts in England to sue in our courts for the recovery of the personal effects of the bankrupt, yet it has been confined to those cases in which no right or claim to the property was set up by a citizen or American creditor, and the permission so granted was expressly placed upon the doctrine of comity, and not upon any legal or international right supposed to exist in the assignee.

Notwithstanding the want of unanimity in the early Amer-

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ican cases, the rule is now considered well settled, and is thus stated by Judge Story in his Conflict of Laws, 411:

"There is a marked distinction between a voluntary conveyance of property by the owner and a conveyance by mere operation of law in cases of bankruptcy *in invitum*. Laws cannot force the will, nor compel any man to make a conveyance. In place of a voluntary conveyance of the owner, all that the legislature of a country can do, when justice requires it, is to assume the disposition of his property *in invitum*. But a statutable conveyance, made under the authority of any legislature, cannot operate upon any property except that which is within its own territory."

Parsons, in his work on Mercantile Law, 312, says:

"We hold in this country that the bankrupt and insolvent laws form a part of the law of nations in no sense and in no respect; that they not only derive all their force from the authority of the State which enacts them, but have no force whatever—no more than any other local and municipal law—beyond the limits of that sovereignty. So, too, our courts hold that the cession of the bankrupt's assets to his assignee is not to be regarded as his own act, but rather as the result of, and effect of, his civil death. He has, as a merchant, ceased to be. He has no longer anything to do with his property, and does not possess and cannot exercise any more right or power in respect to it than a mere stranger. And the principle on which his assets are to be gathered and distributed is the same which would be applied if he had died insolvent, and an administrator, instead of an assignee, had possession of his property. Hence, it follows that within the State where insolvency goes into effect, it operates on all the property in the same way that insolvency declared by probate would operate on the effects of a dead man—that is, only within the State where it occurs, leaving creditors under other jurisdictions to get hold of other assets if they can."

The rule thus stated, denying to the insolvent or bankrupt laws of a State any extra territorial operation, is by no means without a qualification, for upon an examination of the decis-

ions which maintain and support the rule, and upon the faith of which the principle is held to be settled, it will be found that a distinction or reservation is made with respect to parties who reside in the State where the proceeding in bankruptcy is had. The question of residence of parties seeking to appropriate the assets of the bankrupt is regarded as very material. In *Milne v. Marton*, 6 Binn. 353, Ch. Jus. Tilghman refers to the ruling of the English courts, wherein it is held "that if an inhabitant of England attaches the property of an English bankrupt in foreign parts, and thus obtains payment, he will be compelled to refund the money in an action by the assignee, because, residing in England, and bound by the law of his country, it is against equity that he should defeat the object of that law, which is the placing of all creditors on an equal footing."

In the same case, the learned judge says: "In this (Pennsylvania) State we have permitted *English* assignees to bring actions in the name of the bankrupt for their own use, and we have held that, *between British subjects*, a discharge under an *English* Commissioner is a bar to an action here."

In the same case, Judge Yeats remarked: "It is one thing to assert that assignees of bankrupts, under foreign institutions, should be allowed by the courtesy of nations to support suits, as the representatives of such bankrupts, for debts due to them; and it is another thing to give efficacy to these institutions, to cut out attaching creditors, although posterior in point of time, who have commenced their proceedings under the known laws of the government to which they owed allegiance, and from whom they were entitled to protection."

So in *Mulliken v. Aughinbaugh et al.*, 1 Penn. (P. & W.) 117, and in *Lowry v. Hall*, 2 Watts & Serg. 130, it was held that an inhabitant of Maryland would not be allowed to attach a debt in Pennsylvania which the creditor in Maryland had assigned to obtain a discharge from arrest under the insolvent laws of that State.

So in *Sanderson v. Bradford's trustee*, 10 N. H. 260, the Supreme Court of New Hampshire held that a general assign-

ment of property for the benefit of creditors by a citizen of Massachusetts, in conformity with the insolvent laws of that State, will operate to transfer a debt due from a citizen of New Hampshire as against creditors of the assignor who are citizens of Massachusetts. Parker, Ch. Jus., in delivering the opinion of the court, said:

"The creditors in this case are citizens of a foreign government, (Massachusetts,) and have no particular claim to the benefit of our laws if there is any conflict between them and the laws of Massachusetts. Their demand against Bradford does not appear to have been made payable here, nor is there anything to show that they contracted with any reference to the laws of this State. Property situated in this State, or debts due here, cannot be supposed to have been the means to which they looked for payment, in any event, when the debt was contracted; and no reason suggests itself why they should stand in any better situation than creditors of Bradford who are citizens of Massachusetts."

So in *Whipple v. Thayer*, 16 Pick. 25—which was an assignment by a citizen of Rhode Island for the benefit of his creditors, the validity of which was questioned by reason of its conflict with the laws of Massachusetts—Shaw, Chief Justice, said:

"Without at present deciding the more general question whether this assignment, made by the owner of property, in a mode conformable to the laws of the place of his domicile, would be good against a subsequent attachment made by a citizen of this State, the court are all of opinion, that, as against a citizen of Rhode Island, the assignment was good."

The case of *Daniels v. Willard*, 16 Pick. 36, is to the same effect.

In *Van Hook v. Whitlock*, 26 Wend. 43, the Supreme Court of New York admitted the doctrine to be, that, as between citizens of the same State, the insolvent's discharge is valid, as it affects contracts made posterior to the law; but, as against citizens of other States, it is void as to all contracts wherever made.

In *Beer v. Hooper et al.*, decided by the High Court of Errors and Appeals of Mississippi, in October, 1856, (32 Miss. 246,) plaintiff was a citizen of Pennsylvania, and sued out an attachment in the State of Mississippi against Beer & Co., of New Orleans, Louisiana, and attached a debt due to Beer & Co. from a citizen of Mississippi.

The defence set up was, that, prior to the attachment, Beer & Co. had made a voluntary surrender of their effects, (embracing the debt attached,) under the insolvent laws of Louisiana, to the Sixth District Court of that State, and that one A. Beer had been appointed syndic. Beer, as syndic, claimed the debt due by the garnishee. The attachment was taken out on the 24th of May, 1855. The surrender and appointment of syndic were made on the 21st of May, 1855. Judgment was given for the plaintiff sustaining the attachment, and the Court of Appeals affirmed it, upon the ground that the plaintiff was not a resident of Louisiana, and therefore not bound by the laws of that State, or owing any allegiance thereto.

A very late case, decided in the Supreme Judicial Court of Maine, in 1860, (*Felch v. Bugbee et al.*, not yet reported, but published in vol. 9, p. 104, of the *American Law Register*,) raises the same question. The court decided that an assignment of a debtor's property, under the insolvent laws of Massachusetts, will not operate upon debts or property in Maine so as to defeat the attachment of a creditor who is a citizen of Maine made subsequently to such assignment. The learned judge, in delivering the opinion of the court, thus speaks of the rule:

“After a careful consideration of the reasonings and decisions of the courts on this vexed question, we can only say that if the question was an open one in all respects, we might incline to the doctrine that the place of making and place of performance should control, on the grounds before stated, rather than the fact of citizenship. Yet, we are forced to the conclusion that a different rule has been finally established by the Supreme Court of the United States and concurred

in by most of the State courts; and we are not disposed to depart from the rule thus established. It rests entirely upon the citizenship of the party, and not at all upon the place of making or performance. It is the result of that train of reasoning which regards the insolvent laws of a State as local, having no extra territorial force so as to act upon the rights of citizens of other States; that as between citizens of the State, the discharge will bind them as to all posterior contracts wherever made or wherever to be executed; and, as to citizens of other States, it will not discharge any existing contract, although made or to be performed in the State granting the discharge. This rule is broad enough to exclude all questions arising either from the place of making or place of performance. It rests entirely in the citizenship of the parties, and treats all other matters as immaterial."

We might cite numerous other cases in which it is held that the question of citizenship is not only important but in many respects controlling, but enough has been given to show the general current of authority.

If it was an open question, we should be inclined to adopt the doctrine as founded in good sense, for we think no good reason can be urged why a creditor residing in the same State with the bankrupt, and subject to its local jurisdiction, should be permitted, through the courts of another State, to obtain an advantage over other creditors, by seizing, through legal process, the effects of the bankrupt in such State. To do so, would be conferring upon him a right which is denied him by the laws of his own State.

In the case at bar, the plaintiffs were residents of Louisiana at the time the debt due them was contracted, and at the time of instituting the proceeding in bankruptcy, and, as admitted by counsel, are still residents of that State. The debt sued upon was contracted and made payable in Louisiana, and with reference to the local law of Louisiana. They, furthermore, had notice prior to the institution of this suit of the proceeding in bankruptcy, and their demand appears in the schedule of debts due by defendants. They cannot, there-

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fore, be permitted to obtain, through the instrumentality of our courts, a priority over other creditors. A question may arise as to whether they may not be entitled to attach a part of the fund, as it does not appear very satisfactorily from the record whether the application for the benefit of the bankrupt law was made by Beste alone, or by both him and his partner; nor does it appear whether the debt attached was due Beste individually, or the firm of Beste & Grima, the answer of the garnishee being omitted in the record. These questions seem to have been overlooked upon the trial below, which makes it necessary to remand the cause.

Judgment reversed and cause remanded, the other judges concurring.

WILLIAM CLAFLIN *et al.*, Respondents, v. ADALINE H. VAN WAGONER AND JOHN M. KRUM, Appellants.

Wife's Estate, liability of.—Property had been conveyed to trustees to the sole use of a married woman, &c., "and to such uses and purposes, and in such manner as she might, in writing, appoint." Subsequently she became endorser of a negotiable promissory note. *Held*, that such endorsement was an appointment in writing, and that she thereby charged her separate estate.

Pleading—Parties.—Where the action concerns the separate property of the wife, she must sue or defend by her next friend, without joining the husband. (R. C. 1855, p. 1218, Practice, Art. II., § 7.)

Pleading—Parties.—Where it is sought to charge the wife's separate estate with her debts, her trustee is a proper party defendant, so that in case of sale the legal title may be conveyed. (R. C. 1855, p. 1218, § 4.)

Appeal from St. Louis Court of Common Pleas.

Krum & Decker, for appellants.

I. A married woman cannot be sued alone, without the appointment of a next friend, or joining her husband. (R. C. 1855, p. 1218, Art. II., § 7; *Cost v. Cost*, 4 How., Prac. R., 232; *Eliz. Smart*, by next friend, v. *Comstock*, 24 Barb. 411.)

II. The petition did not state facts sufficient to constitute a cause of action against Mrs. Van Wagoner, to entitle the plaintiff to the relief prayed for as against her separate estate.

The petition alleges that the property was conveyed to trustees to the use, &c., "and to be disposed of and employed to such uses and purposes, and in such manner as the said Adaline H. might in writing appoint." If by the terms of the settlement the wife be restricted in her power of disposition, that would be a fetter upon anticipation or alienation valid in equity. (Adams' Eq. 44, s. p.; Cannon v. Whiteside, 33 Mo. 466.)

The mere endorsement by her in blank of the note sued on was not an appointment in writing, within the terms of the deed. (Yale v. Dederer, 22 N. Y. 450.)

Hitchcock, for respondent.

I. It was not necessary to join the husband of defendant, Adaline H. Van Wagoner.

a. The action did expressly concern her separate estate, and if so she could be sued alone. (R. C. 1855, p. 1218, Prac., Art. II., § 7.)

b. The action was well brought to charge her separate estate, it being an endorsement *by her alone*. (Whiteside v. Cannon, 23 Mo. 457, 471; Coates v. Robinson, 10 Mo. 757.)

II. The judgment was that her separate estate be charged. Krum was made a party as her trustee; he appeared and defended as such, and no personal judgment was prayed or taken against him.

BATES, Judge, delivered the opinion of the court.

The petition shows the plaintiffs to be the holders of a negotiable note made by Thomas Cohen to the order of Adaline H. Van Wagoner, who endorsed it to the plaintiffs; that the note had matured; a demand and refusal of payment, and notice thereof to Mrs. Van Wagoner. It shows that Mrs. Van Wagoner is a married woman, the wife of Garret S. Van Wagoner; that, by ante-nuptial deed of trust, she conveyed certain real estate to John M. Krum, the other defendant, "in trust for the sole and separate use, benefit, behoof, and disposal of said Adaline, and to be accounted, reckoned and

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taken as a separate and distinct estate of and from the estate of said Garrett, and to be disposed of and employed to such uses and purposes and in such manner as the said Adaline H. might in writing appoint;" and charges that Mrs. Van Wagoner by her endorsement of said note became bound and liable to pay the amount thereof to the plaintiffs, and thereby then and there, by law, pledged and appointed her separate estate for the payment of said note. The petition then prayed for judgment against Mrs. Van Wagoner and her separate estate, and that the real estate, or so much thereof as might be necessary to pay said note, interest and costs, be sold to pay the same.

The defendants demurred generally to the petition, Mrs. Van Wagoner appearing by attorney. The demurrer was overruled, and time given the defendants to answer. They failed to answer, and the petition was taken against them as confessed, and judgment perfected against Mrs. Van Wagoner in accordance with the prayer of the petition. The defendants moved an arrest of judgment, for the reasons—

1. That Mrs. Van Wagoner was a *femme covert*, incapable of being sued without her husband being joined; and

2. That no judgment was prayed against defendant Krum, or cause of action set out against him in the petition.

The motion was overruled, and the defendants appealed to this court.

It is settled that where the *femme*, having a separate estate, executes a bond or note, or accepts a bill, it is held that she must intend by such instrument to bind her separate estate, because these acts would otherwise be nugatory, and these instruments could, in no other way, have any validity or operation. (*Whiteside v. Cannon*, 23 Mo. 457.) This will apply as well when the woman is endorser of a note as when she is a maker. An exception to the rule may probably be found in those cases in which the separate estate of the woman is, by the instrument creating it, declared inalienable by her. In the present case she may alienate by an appointment in writing, and the endorsement is such appointment in writing.

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There is error, however, in that Mrs. Van Wagoner appeared by attorney and not by next friend. Sec. 7, of art. 2, of the Practice Act, 2d Rev. Stat., 1218, is as follows:

“When a married woman is a party her husband must be joined with her, except that—First, when the action concerns her separate property, she may sue and be sued alone. Second, when an action is between her and her husband, she may sue and be sued alone. But when her husband cannot be joined with her, as herein provided, she shall prosecute or defend by her next friend.”

This section establishes the general rule that the husband must be joined with the wife, and the word “alone,” used in the exceptions, means only apart from the husband. The concluding direction that she shall prosecute or defend by her next friend, when her husband *cannot* be joined with her, applies to both exceptions—to the second with obvious necessity, and to the first because her husband, having no manner or degree of legal interest in her separate estate, for that reason *cannot* be joined with her. The judgment will be reversed and cause remanded to the court below, where a next friend may be appointed for Mrs. Van Wagoner, by whom she may defend the action.

As to the propriety of Mr. Krum’s being a party. He holds the legal title of Mrs. Van Wagoner’s separate estate, and it is proper that he should be a party to the proceedings to charge that estate, so that if there should be a sale of the estate, or a part of it, his legal title, as well as Mrs. Van Wagoner’s equity, may be conveyed. It is for the interest of all parties.

Judgment reversed and cause remanded. Judges Bay and Dryden concur.

JOHN G. KNIPPER, BY NEXT FRIEND, Respondent, v. WILLIAM BECHTNER, Appellant.

Evidence—Objection.—Where an objection is made to the admission of evidence in the court below, the reason of the objection must be stated, or the matter will not be reviewed by the Supreme Court.

Bartlett v. Steamboat Philadelphia.

*Appeal from St. Louis Law Commissioner's Court. ***A. M. & S. H. Gardner*, for appellant.*Flournoy*, for respondent.

BATES, Judge, delivered the opinion of the court.

This was an action for damages for malicious prosecution brought in the St. Louis Law Commissioner's Court. There was a verdict and judgment for plaintiff. The defendant appealed to this court, and now insists that there was no evidence to support the verdict.

There was some evidence given at the trial preserved in the bill of exceptions, but it does not appear in the bill of exceptions that the evidence there preserved was all the evidence given at the trial. We cannot, therefore, disturb the verdict on that ground. The appellant also insists that a paper purporting to be a transcript from the record of the Recorder's Court of the city of St. Louis was offered by the plaintiff, and erroneously admitted in evidence against his objection. The record only shows that the defendant objected to the paper being given in evidence, without stating the grounds of the objection. We will not look into an objection so made, because we cannot tell what was the real objection made in the court below. Instructions were given in the court below, and some asked by the defendant were refused, but no point is made upon them in this court.

Judgment affirmed. Judges Bay and Dryden concur.

HENRY T. BARTLETT *et al.*, Respondents, v. STEAMBOAT PHILADELPHIA, Appellant.

Carriers.—The undertaking of a common carrier to transport goods to a particular destination necessarily includes the duty to deliver them in safety. The delivery must be made or tendered in proper time and manner and at a proper place, and *prima facie* to the consignee personally.

Bartlett v. Steamboat Philadelphia.

Appeal from St. Louis Court of Common Pleas.

The facts are stated in the opinion.

P. E. Burke, for appellant.

I. The appellant fulfilled the contract by delivering the goods at the place to which they were consigned, in good order, and at a seasonable hour, according to the usual custom of delivery of goods, at the port to which they were consigned. (*Fletcher v. Marine Ins. Co.*, 18 Mo. 199; 2 *Arnold, Ins.*, 779.)

II. The goods were not consigned to any incorporated town, and the act of 1855 concerning the delivery of goods by steamboats does not apply to this case.

III. It was the duty of the respondents to have had some one at the landing to which the goods were consigned to receive the goods when delivered by the boat.

IV. The goods were put off at the proper landing, in good condition, in due time, and in the same manner as other goods belonging to *Fleischman*, who paid the freight on those goods and claimed to be the owner of them. Notice of delivery was given to the person who kept the landing.

V. On the Western waters, the custom of steamboatmen determines the sufficiency of the delivery. It was shown to be custom to deliver the goods at the landing to which they are consigned, in good order, and to notify the person who keeps the landing of their delivery. This was done.

Knox & Kellogg, for respondents.

I. There was no valid delivery, so as to discharge the carrier. (*Angell on Car.*, § 301-2, 315, 325.)

II. The property, if delivered at all, was delivered to no person authorized to receive it. (*Angell on Car.*, § 323, 325.)

BATES, Judge, delivered the opinion of the court.

The plaintiffs shipped, at St. Louis, on the steamboat Philadelphia, ten bales of gunnies, to be delivered at Price's Landing, on the Mississippi river. No bill of lading was taken,

Bartlett v. Steamboat Philadelphia.

nor any consignee or agent at Price's Landing named in the contract.

The plaintiffs sue the boat for not delivering the gunnies to them at Price's Landing. It appeared that the freight was paid by a passenger on the boat, who had also freight of his own on the boat consigned to the same place. When the boat arrived at Price's Landing, the gunnies were put out on the bank, and the clerk of the boat asked Mr. Price (who had a warehouse there) if he would put them under the shed, who refused to do it.

The voyages of the boat were from St. Louis to Memphis and back. There was some evidence that the persons entitled to the gunnies did get them. The court gave the following instructions :

1. Unless the jury find from the evidence that the defendant delivered the freight, shipped by the plaintiffs at Price's Landing, to the plaintiffs, or some person or agent authorized to receive the same, they will find for the plaintiff the value of said freight.

2. The mere putting of freight on shore at the place to which the same was shipped, does not constitute a delivery. To constitute a delivery of the freight in question, it must have been delivered by the defendant to the charge of some person or agent at Price's Landing authorized to receive the same.

3. It was the duty of the defendant to deliver the freight in question to the plaintiffs or their agent at the place to which the same was shipped; and in case that neither the plaintiffs nor their agent could be found at the place, then it was the duty of the defendant either to store the freight or return the same.

The court refused to give the following instructions asked by defendant:

1. If the court find from the evidence that the defendant delivered the bags, shipped by the plaintiff at Price's Landing, in reasonable time, and in good order as shipped, then plaintiffs are not entitled to recover.

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2. If the court find from the evidence that the defendant delivered the gunny bags at Price's Landing, in suitable weather, to the warehouseman there, then the plaintiffs are not entitled to recover.

The undertaking of a common carrier to transport goods to a particular destination necessarily includes the duty to *deliver* them in safety. The delivery must be made or tendered in proper time and manner, and at a proper place, and *prima facie* to the consignee personally. But, at least with carriers by water, the manner of delivering the goods depends much upon the custom of particular places and the usage of particular trades. In this case, there is no custom or usage proved; and, whilst I am not satisfied with the verdict, there is no such error apparent in the record as will authorize a reversal of the judgment.

Judgment affirmed. Judges Bay and Dryden concur.



SAMUEL HAMBLETON, Appellant, v. BERNARD M. LYNCH, Respondent.

Officer—Possession.—When a constable of St. Louis county had levied upon a slave by virtue of executions from a justice of the peace, and upon a claim of property made by a claimant had taken a bond of indemnity from the plaintiffs in the executions, in accordance with the statute, and had placed the slave in the possession of defendant as bailee; *held*, that the possession of the bailee was that of the constable; and that an action for the delivery of the slave could not be maintained against the bailee.

Appeal from St. Louis Court of Common Pleas.

Watson, as constable of St. Louis township, seized a negro slave by virtue of executions issued by L. Waite, a justice of the peace, in favor of Parker et al. against one Dunnell. The plaintiff in this suit made his claim under oath, in accordance with the local act for St. Louis county, entitled "An act concerning the duties of sheriff," &c., of March 3, 1855, (Session

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Acts, 1855, p. 464); and thereupon the plaintiffs in the execution gave the constable bond, and directed him to proceed with the sale, as required by the act. The defendant in this suit had the possession of the slave as the depositary of the constable, Watson. Upon the trial, the court gave judgment for the defendant, upon the agreed case.

Lackland, Cline & Jameson, for respondent.

The only question, we perceive, which arises upon the record in this case is, whether an action of replevin or claim and delivery of personal property will lie against an officer for property levied upon by him under an execution, after the claimant has filed his claim, and the bond has been given agreeably to the provisions of the statute. That question is settled in the case of the State to use of *Goldsall v. Watson*, 30 Mo. 122.

No brief for appellants on file.

BATES, Judge, delivered the opinion of the court.

Hambleton sued Lynch for possession of a slave. The slave had been seized in execution against a third person by constable Watson, who deposited him with Lynch, who was keeper of a negro yard, merely for safe keeping.

After the seizure of the slave by the constable, he was claimed by the plaintiff Hambleton, and thereupon the plaintiff in the executions gave indemnification bonds, as provided by the statute, and required the constable to sell the slave. Before sale, the slave was taken from the possession of Lynch by the proceedings in this case. At the trial, judgment was given for the defendant. The judgment was right. The possession of Lynch was the possession of the constable only, and the suit could not be maintained against the constable. (State to the use of *Goldsall v. Watson*, 30 Mo. 122; *St. Louis, Alton and Chicago Railroad v. Castello*, id. 124.)

Judgment affirmed. Judges Bay and Dryden concur.

MARY A. BLANCHARD, Respondent, v. SARAH M. HATCH *et al.*,
Appellants.

Justices' Courts—Appeals.—A non-resident of the county against whom a judgment by default is rendered by a justice of the peace, must move to set aside the judgment within ten days from its rendition. The provision allowing the non-resident twenty days further in which to take his appeal, by § 3, art. 9, Justices' Courts, R. C. 1855, p. 671, does not apply to the application for setting aside the default.

Appeal from Law Commissioner's Court.

George Marshall, for appellant.

I. The appellants being non-residents, and that fact being shown, they were entitled to twenty days within which to appeal. (R. C. 1855, p. 971, § 3.)

II. If the statute allowed a non-resident twenty days to appeal, the privilege thereby granted carried with it all means and powers necessary to carry out that privilege.

Goodlett and *Mantz*, for respondent.

An appeal will not lie from a judgment by default before a justice of the peace, unless within ten days after rendition application shall have been made to set the same aside. (R. C. 1855, p. 971, § 2.)

BATES, Judge, delivered the opinion of the court.

Plaintiff sued defendant before a justice, and got judgment by default. More than ten days thereafter defendant moved the justice to set aside the judgment by default, and showed that he was a non-resident of the county. The justice overruled the motion, and the defendant took an appeal to the Law Commissioner's Court. The Law Commissioner, on plaintiff's motion, dismissed the appeal because the motion to set aside the judgment by default was not made in ten days after the judgment, and the defendant appealed to this court.

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The second section of the ninth article of the act regulating proceedings in justices' courts (2 R. C., 971) provides that no appeal shall be taken from a judgment by default, unless within ten days after the rendering of such judgment application shall have been made to the justice to set it aside and he shall have refused.

The third section provides that no appeal shall be allowed unless it be made within ten days after the judgment rendered, or when judgment is by default, within ten days after the refusal of the justice to set it aside; "but if a non-resident of the county where the suit shall be instituted, the party shall in all cases of appeal allowed by this act have twenty days to make such appeal." The extension of time to non-residents is of the time within which they may take appeals, and not of the time within which they may apply to have judgments by default set aside, which is an entirely distinct matter, and provided for in a different section of the act.

If the defendant had within ten days from the judgment by default made application to have it set aside, he would have had twenty days from the time his application was refused within which to take his appeal, but he has not twenty days within which to apply to have the judgment set aside.

Judgment affirmed.



GEORGE MATLACK *et al.*, Respondents, v. JOHN G. LARE,
Appellant.

Jurisdiction.—A party may waive part of his demand for the purpose of giving jurisdiction to an inferior court. (Hempler v. Schneider, 17 Mo. 258, and Denny v. Eckelkamp, 30 Mo. 146, affirmed.)

Mechanic's Lien—Description.—For the purpose of enforcing a mechanic's lien, the real estate upon which the buildings are erected must be described with such certainty as to identify it.

* *Appeal from St. Louis Law Commissioner's Court.*

Plaintiffs commenced suit in the Law Commissioner's Court, March 17, 1859, upon a mechanic's lien, filed in the

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office of the clerk of the St. Louis Land Court, March 14, 1859, for the sum of one hundred and fifty-seven dollars and sixty cents.

At the trial the plaintiffs offered in evidence a certified copy of the lien as filed in the Land Court, to the admission of which defendant objected, because the court had no jurisdiction over the sum of one hundred and fifty dollars. The plaintiffs thereupon asked leave to remit the sum of seven dollars and sixty cents of the amount claimed in the lien, so as to bring the demand within the jurisdiction of the Law Commissioner's Court; which was done.

The statement filed with the account in the Land Court described the property as two three-story brick houses, situated on the east side of Fifth street, between Franklin avenue and Morgan street, and reputed to be owned by the said John G. Lare.

C. D. Colman, for appellant.

I. The Law Commissioner's Court had no jurisdiction of the subject matter of the action, the amount claimed in the lien and petition exceeding one hundred and fifty dollars.

The St. Louis Land Court has exclusive original jurisdiction whenever the amount claimed exceeds one hundred and fifty dollars. (Laws 1857, p. 669, § 6.) The amount for which the lien is filed determines the jurisdiction. (R. C. 1855, p. 1072, § 28.)

II. The court erred in admitting the transcript of the lien filed in the Land Court, as neither the lien nor the petition contain any description of the property to which the lien is to apply.

Knight, for respondent.

I. The court had jurisdiction. (R. C. 1855, p. 1072; Act 1857, p. 668.)

II. The jurisdiction is to be determined, not by the amount claimed in the lien filed in the Land Court, but by the amount

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claimed in the action to enforce the lien. (Act 1857, p. 669, § 6 & 7; *Annis v. Bigney*, 28 Mo. 247.)

III. The court did not err in permitting plaintiff to remit seven dollars and sixty cents, to bring the amount claimed within the jurisdiction of the court. (*Denny v. Eckelkamp*, 30 Mo. 140; *Shreve v. Skeele*, 31 Mo. 216.)

IV. There was no error in admitting evidence of the filing of the lien in the Land Court. (*Cornelius v. Grant*, 8 Mo. 59; *Schulenburg v. Gibson*, 15 Mo. 281; R. C. 1855, p. 730, § 41, 42; Acts 1857, p. 669, § 4.)

BAY, Judge, delivered the opinion of the court.

In *Hempler v. Schneider*, 17 Mo. 258, and *Denny v. Eckelkamp*, 30 Mo. 140, this court held that a party might give jurisdiction to an inferior court by a voluntary renunciation of a part of his demand. This cause, however, must be remanded, for the reason that there was no lien to enforce. To entitle the plaintiffs to a lien it was necessary for them to file with the clerk of the St. Louis Land Court a just and true account of their demand, which they seek to make a lien upon the buildings and a true description of the property, *or so near as to identify the same*, upon which the lien is intended to apply. In this case the account filed contains no such description of the property as would enable any person to identify it. It describes it as two three-story brick houses on the east side of Fifth street, between Franklin avenue and Morgan street. No boundary is given, nor is the number of the lot designated, nor does it even state that the property is in the city of St. Louis. To enforce a judgment upon a mechanic's lien, the law requires that the execution shall be a special *feri facias*—such an execution issued upon this judgment would fail to disclose to the officer the property to be sold. He certainly could not identify the property by the description in the *feri facias*. The defect is fatal as to any lien; but according to the decision in *Patrick v. Abeles*, 27 Mo. 184, the plaintiff may take a general

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judgment, and to enable them to do so we shall remand the cause.

Judgment reversed and cause remanded, the other judges concurring.

HORACE BILLINGS, Respondent, v. HENRY AMES *et al.*,
Appellants.

Jurisdiction—Patent.—The courts of the State have jurisdiction in cases of contracts in which patents are brought in collaterally. When the defendants, who had been sued for a breach of the plaintiff's patent for putting up cemented hams, agreed with the plaintiff that if he would dismiss the suit against them, and allow them the partial use of the patent for the year, they would not manufacture or put up cemented hams of any kind during the existence of the patent; *held*, that the suit upon such contract was properly brought in the State courts.

Restraint of Trade.—*Held*, also, that such contract was not void, as being in restraint of trade. (*Presbury v. Fisher & Bennett*, 18 Mo. 50, cited.)

Contract—Construction.—*Held*, also, that such contract not only prohibited the defendants from putting up the article covered by the patent, but from putting up articles resembling those described in the patent and liable to compete therewith in market.

Damages.—In an action upon such contract, the measure of damages was properly declared to be the amount the plaintiff's hams had depreciated in price by the cemented hams put up and sold for defendants, after the expiration of the year mentioned in the contract, and before the commencement of this suit.

Appeal from St. Louis Court of Common Pleas.

J. A. Buchanan, with Glover & Shepley, for appellants.

I. The St. Louis Common Pleas had no jurisdiction of the cause of action. The action was substantially for the infringement of a patent right, of which only the courts of the United States have jurisdiction. (5 Stat. U. S. 117; act July 4, 1836; 2 Kent. 405; Curtis on Pat., § 405; Parsons v. Barnard, 7 J. R. 144; Gilson v. Woodworth, 8 Paige, 132; Dudley v. Mayhew, 3 Comst. 9.)

The error is not cured by verdict. A verdict will cure a title defectively set out, but not a defective title. (*Rushton v. Aspinwall*, 1 Smith's L. C. 334; *Andrews v. Lynch*, 27 Mo. 167.)

II. The defendants were entitled to prove that the plaintiff's recipe had been known and used prior to plaintiff's patent. The evidence would have been admissible in a suit for the infringement of the patent. (*Hotchkiss v. Greenwood*, 11 How. 248.) In this case defendant had the same right, *a*, to show that plaintiff had no right to a patent, and, therefore, there was no consideration for the agreement, (*Joliffe v. Collins*, 21 Mo. 338, 343; *Dickinson v. Hall*, 14 Pick. 220; *Van Ostrand v. Reed*, 1 Wend. 424;) and, *b*, in mitigation of damages, (*Segman et al. v. McCormick*, 16 How. 480.)

III. The defendants were entitled to prove that the hams branded "G. J. Griggs" were put up according to a recipe different from the plaintiff's, thus to show that defendants had not violated their agreement. (*Keflinger v. De Young*, 10 Wheat. 358; *Carson v. Hyde*, 16 Pet. 513; 2 Greenl. Ev. § 496; *Honey v. Pitcher*, 13 Mo. 191; *Pitcher v. Honey*, 16 Mo. 436; *Rich. v. Atwater*, 16 Conn. 409.)

IV. The contract between the parties was in effect that defendants would not violate the patent of plaintiff. *a*. It so appears from the circumstances under which the contract was made. (2 Pars. Cont. 12; *Patterson v. Camden*, 25 Mo. 13; *Rich. v. Atwater*, 16 Conn. 409; *Player v. Homersham*, 4 M. & S. 422; 3 Barr & Ald. 175; 2 Ves. 310; 1 Cowen, 122; Coup. 9.) *b*. Because, the construction the plaintiff puts upon the contract would make it a contract in restraint of trade, and therefore void. (2 Pars. Cont. 121; *Rich. v. Atwater*, 16 Conn. 409; *Clark v. Pinney*, 7 Cow. 681; *Hardeastle v. Hickman*, 26 Mo. 476; 1 How. 169; 19 Me. 394; 8 Mass. 216; 5 Barr & Ald. 606; 4 M. & S. 42; 38 Me. 367; 8 Mass. 183; 5 T. R. 522.)

V. The contract, if in restraint of trade, was void. (2 Pars. Cont. 254 & 257, and notes; *Alger v. Thatcher*, 19 Pick. 51; Chit. Cont. 664; *Mitchell v. Reynolds*, 1 Smith's L. C., 174; *Ward v. Byrne*, 5 M. & W. 547, 561, 562; *Price v. Green*, 16 M. & W. 346; *Chappell v. Brockway*, 21 Wend. 157.)

VI. The measure of damages laid down by the court was erroneous. By the instruction, the plaintiff could recover remote and speculative damages, and therefore it was erroneous. (2 Pars. Cont. 454; *Bridges v. Stickney*, 38 Me. 361; *Hadley v. Boxendale*, 9 Exch. 241.)

a. The agreement being that defendant shall not violate plaintiff's patent, the plaintiff could only recover the profits defendants had made, and the burden of proof as to this amount was upon the plaintiff. (*Segman v. McCormick*, 16 How. 487; *City New York v. Ransom*, 23 How. 487; *Curtis on Part.*, § 251; 2 Pars. Cont. 458.)

b. If the agreement prevented defendants putting up cemented hams of any kind, the plaintiff could only recover such damages as were the immediate and necessary result of the breach of contract. (*Mayne on Dam.* 6 & 52; *Bridges v. Stickney*, 38 Me. 361; *Batchelder v. Sturgis*, 3 Cush. 201; *Fox v. Harding*, 7 Cush. 516; *Bradley et al. v. Denton*, 3 Wis. 557; *Barnard v. Poor*, 21 Pick. 378; *Chapin v. Norton*, 6 McLean, 500; *Hamlin v. Gt. Western Railway*, 38 Eng. L. & E. 335; *Sedg. Dam.* 104.)

G. P. Strong, for respondent.

I. The court had jurisdiction of the cause of action. The suit was not upon the patent, nor for an infringement of the patent, but for the breach of a contract collateral to the patent, as much so as if it had been upon a note given for a patent right.

It is only in actions directly upon the patent that the jurisdiction of the federal courts is exclusive. (7 J. R. 144; 16 Conn. 409.)

The contract is not void as being in restraint of trade. (*Presbury v. Fisher*, 18 Mo. 50; *Chit. Cont.* 663; *Chappell v. Brockway*, 21 Wend. 158; *Ross v. Sadgbear*, 21 Wend. 166; *Whittaker v. Howe*, 3 Beav. 383, 393; *Mitchell v. Reynolds*, 1 P. Wms. 181; 1 *Smith's L. C.* 172; *Perkins v. Lyman*, 9 Mass. 494, 500.)

The contract was limited as to space. It was reasonable. It was limited as to time.

III. The court correctly laid down the rule by which to estimate damages. (2 Pars. Cont. 454, 461; Alder v. Keightly, 15 Mee. & W. 117; 13 How. 307.)

BAY, Judge, delivered the opinion of the court.

Plaintiff brought suit against defendants in the St. Louis Court of Common Pleas for an alleged breach of contract, which contract is as follows:

“ST. LOUIS, March 5, 1856.

“*Mr. Horace Billings.*—Dear Sir: In consideration of your withdrawing the suit brought against us in New York, for infringing your patent for putting up cemented hams, and for the privilege of putting up fifty thousand hams this year and selling, them, we hereby agree and bind ourselves to put up no more cemented hams of any kind without your consent during the existence of your patent.

HENRY AMES & Co.”

Plaintiff alleges in his petition that in pursuance of said agreement he caused the suit mentioned therein to be dismissed, and that defendant exercised the privilege of putting up and selling, during the year 1856, the number of hams specified in the agreement. The petition further alleges, as a breach of said agreement, that in the years 1857 and 1858, defendants, without the consent of plaintiff, put up and sold in the New York market a large number of cemented hams. Plaintiff further states that in 1857 he put up and sold in the New York market 29,456 lbs. of cemented hams, put up according to his patent; and in 1858, 930,604 lbs.—one-half of the latter for account of Nolte & McClure, of Illinois; that during said year the demand in New York for cemented hams was limited, and almost exclusively for the California market; that by reason of the breach of said contract by said defendants, the price of the cemented hams of plaintiff, sold as aforesaid, depreciated to the extent of half a cent per pound, and plaintiff lost that amount.

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The answer of defendants sets up a want of jurisdiction in the Court of Common Pleas, also an agreement executed by plaintiff in the words and figures following, to-wit:

“ST. LOUIS, March 5, 1856.

“In consideration of three thousand dollars, the receipt of which is hereby acknowledged, I hereby agree to cause to be dismissed the suit brought against Henry Ames and Edgar Ames, in New York, for infringing my patent for the covering of hams, and also release them from all damages from any infringement of said patent heretofore; and also give them the privilege of putting up fifty thousand hams this year in the same manner as they have heretofore covered them, which privilege expires this year, with the understanding that they are to put up no more cemented hams without my consent during the existence of my patent.

HORACE BILLINGS.”

The answer denies any violation of the agreement, and avers that since the year 1856 the defendants have not put up any cemented hams according to the method shown by the patent of plaintiff; that one George W. Griggs had invented a preparation or composition for covering hams different entirely from that of the plaintiff, and that he (Griggs) had put for the defendants a number of hams openly marked with the name of said Griggs.

Upon the trial plaintiff read in evidence his patent from the government, bearing date March 25, 1851, giving him the exclusive right, for the term of fourteen years, of making, constructing, using, and vending to others to be used, his composition for covering hams. Also, the record of the suit brought in New York against defendants for an infringement of the patent referred to in the agreement, and the dismissal of the same. A large number of depositions of commission merchants in New York, some of whom were doing business in California, were read in evidence, all tending to prove that in 1857 and 1858 the Billings hams commanded a higher price in the California market than any other hams; that

during said years defendants consigned to commission houses in New York and California for sale a very large number of cemented hams, resembling in appearance the hams of plaintiff, but marked with the name of Griggs; that they were well understood to be Ames' hams, put up by Ames, and by him directly consigned. The consignees knew no such man as Griggs; that these hams came in competition with those of Billings, the market being limited, and depreciated the sale and price of plaintiff's hams one cent per pound. The depositions show the number and amount of hams so consigned by defendants during said years, and the number and amount put in market by plaintiff.

The defendants gave in evidence the contract set out in their answer, and evidence tending to show that, by permission of plaintiff, they put up for him, in 1857, 19,834 cemented hams, branded with the name of G. W. Griggs, and shipped the same to Woodruff, of New York, for plaintiff, and received payment therefor from Henning & Woodruff, of St. Louis, on account of plaintiff.

Defendants then offered to prove that the cement used by plaintiff was composed of rosin, shellac and linseed oil, and that his composition was known and used by other pork-packers prior to 1850; that the cement used by Griggs was composed of rosin, cotton-seed oil and Venetian red, and was essentially different from plaintiff's; that none of the hams put up by Griggs for the defendants since 1856 had been put up with the cement of plaintiff, but had been put up with the cement of Griggs. Plaintiff objected to the introduction of such testimony, and the objection was sustained by the court.

The following instructions were given in behalf of the plaintiff:

1. If the jury believe from the evidence that the defendants, either by themselves or their agents, had, prior to the commencement of this suit, put up cemented hams of any kind since the year 1856, and during the continuance of plaintiff's patent, without the consent of plaintiff, they will

find for the plaintiff, and assess such damages as they believe from the evidence plaintiff has sustained by reason of defendants so putting up said hams.

2. If the jury find for the plaintiff under the first instruction, the measure of damages in the case is the difference between the market value or price of the cemented hams put up and sold for the plaintiff during the years 1857 and 1858, and the market value or price such hams would have borne if defendants had not put up and sold any cemented hams during those years; or, in other words, the amount that plaintiff's hams were depreciated in price by the cemented hams put up, or put up and sold for the defendants during those years, and before the commencement of this suit.

The court then gave the following instructions in behalf of defendants:

1. Under the contract read in evidence, the defendants are permitted to put up fifty thousand cemented hams during the year 1856, and there is no restriction as to the time within which defendants might sell these hams. The plaintiff can not recover without proving that he was damaged by the sale by defendants of cemented hams put up beyond this limit of fifty thousand in 1856, and the burden of proof on these points is upon the plaintiff.

2. The plaintiff cannot recover any damages against the defendants by reason of 19,834 cemented hams put up by defendants, branded with the name of G. W. Griggs, and sent to Woodruff & Co. on the order of the plaintiff in 1857, if the said hams were so put up and sent on the plaintiff's account.

And the court refused the following, asked by defendants:

3. The plaintiff cannot recover for any hams put up by defendants after the commencement of this suit, and the burden of proof is on the plaintiff to show when any hams spoken of by the witnesses were actually put up.

4. If the jury believe from the evidence that the depreciation of the price of the hams of plaintiff was caused by the

want of protection afforded by his patent, and not by the number of cemented hams which defendants put into the market, they cannot give damages on this account against defendants.

The jury found for the plaintiff, and assessed his damages at \$4,320. Motions for new trial and in arrest of judgment were overruled, and the cause is brought here by appeal.

The appellants urge the following grounds for the reversal of the judgment :

1. Want of jurisdiction in the Court of Common Pleas.
2. That the contract is void as in restraint of trade.
3. That the court erred in excluding testimony offered by defendants.
4. That the court erred with reference to the measure of damages.

These necessarily involve the propriety of the instructions given and refused, and will be noticed in the order stated.

First—As to the question of jurisdiction. It is insisted by the appellants that this is virtually and in effect a suit for an infringement of a patent right, and therefore only cognizable in the Federal courts. We think differently. It is a suit upon a contract in which the patent is brought in collaterally ; and while it is well settled that the validity of a patent right is a subject peculiarly within the jurisdiction of the courts of the United States, it is equally well settled that when it comes in question collaterally its validity may become a subject of inquiry in the State courts. (*Rich v. Atwater*, 16 Conn. 409 ; *Bliss v. Negus*, 8 Mass. 46 ; *Cross v. Huntly*, 13 Wend. 385.)

This is not a suit for the infringement of a patent, nor for the establishment of a patent, nor to restrain a party from manufacturing or selling an article which is the subject of the patent of another. The cases, therefore, of *Parsons v. Barnard*, 7 John. 143, and *Dudley v. Mayhew*, 3 Comstock, 9, cited and relied on by appellants, are not in point. *Parsons v. Barnard* was an action on the case for a direct infringement of a patent, and *Dudley v. Mayhew* was a bill in

chancery to restrain the defendant from manufacturing and selling a particular kind of stove which was the subject of a patent issued by the government to the complainant. We entertain, therefore, no doubt in regard to the jurisdiction of the Court of Common Pleas.

We see no force in the objection to the validity of the contract, that it is in restraint of trade. It does not prohibit the defendants from engaging in the pork-packing business, nor in putting up and selling hams, but simply restrains them for a limited time in the use of a cement for covering hams, especially one used by plaintiff, and only useful in covering hams destined for a distant market. It is not in any sense a contract prohibiting the pursuit of an occupation, or the carrying on of a particular business; nor does the restraint in anywise affect the public at large; nor is it, in view of the circumstances of the case, unjust or unreasonable. The case of *Presbury v. Fisher & Bennett*, decided by this court and reported in 18 Mo., p. 50, is certainly more liable to the objection than the one at bar. Fisher & Bennett were publishers of a counterfeit detector, and sold out their interest to Presbury, and for a valuable consideration bound themselves in a penal bond not to engage thereafter in the business of publishing such a paper. The court upheld the bond, notwithstanding the restraint was unlimited as to space. The rulings of the English courts, growing out of their peculiar laws respecting apprenticeship, have never been regarded as authority here upon questions of this kind.

The third ground of error is, that the court excluded certain testimony offered by defendants. Whether this is well taken depends upon the construction which is to be given to the contract. It is insisted by the appellants that the words in the written agreement, *cemented hams of any kind*, must be construed to mean *contrary to plaintiff's patent*. If this construction is to be given to it, then it is senseless and without meaning. It would be a contract not to do a thing which the law itself prohibits the party from doing; in other words, it would be an agreement not to infringe upon the patent of

the plaintiff, which, in the absence of any agreement, Ames could not do without subjecting himself to an action for damages. It would place the parties in the ridiculous attitude of making a contract which imposed no obligation and conferred no benefit upon either.

It is a settled rule of construction, that, in construing a written instrument, the court will give effect to every clause and word, provided that it be consistent with the intention of the parties as gathered from the general tenor of the instrument and the motives which led to the agreement.

Apply this rule to the contract here sued on, and there can be no difficulty in giving it a proper construction.

The defendants were large dealers in putting up hams for the New York as well as the California market, and prior to the execution of the agreement had thrown into those markets large quantities of cemented hams, not only coming in competition with plaintiff's hams, but infringing upon his patent. For such infringement plaintiff sued defendants in the city of New York, laying his damages at \$30,000. To get rid of this suit, and to obtain the privilege of putting up 50,000 cemented hams during the year 1856, were of the utmost importance to the defendants, to accomplish which they agreed to put up no more cemented hams of *any kind* during the existence of plaintiff's patent.

Now if we give to this agreement the construction asked by defendants, the only consideration for dismissing the suit and permitting defendants to put up 50,000 hams during 1856, was the naked and worthless promise not to infringe upon the patent of the plaintiff; in other words, a promise not to do a thing which the defendants were prohibited by law from doing, and therefore furnishing no consideration and conferring no benefit. We must presume that the parties intended to accomplish something by the agreement. It is evident that the object of Billings was to avoid competition. He was apprehensive that Ames might use a cement different from his in its materials, and therefore not infringing upon his patent, yet so resembling his as to produce a serious

competition. To avoid this, the words of *any other kind* were inserted in the agreement. This construction not only gives the instrument an intelligible meaning, but is consistent with the intention of the parties, as shown by the surrounding circumstances.

In this view of it, the court below very properly rejected the evidence offered by defendants.

The fourth ground urged by appellants for the reversal of the judgment is that the court erred with respect to the measure of damages. The rule laid down by the court was, the amount that plaintiff's hams had depreciated in price by the cemented hams put up, or put up and sold for defendants during the years 1857 and 1858, and before the commencement of this suit. It is insisted that these are remote and speculative, and, therefore, do not constitute the true measure of damages. We are of the opinion, however, that it is not subject to this objection. It relates to a fact already transpired, and capable of proof. The fact that a particular article bears a certain market price can be proved like any other fact; and that it depreciated by reason of a large influx of the same article, and the amount of such depreciation, are equally capable of proof, and do not in any sense invoke the vague and uncertain opinions of witnesses as to a future rise or fall. The market value of flour in St. Louis in 1861 can be ascertained by the testimony of witnesses who dealt in the article; but if a witness should give an opinion as to what it will be worth in 1863, it would be a mere matter of speculation, and subject to the objection above stated. So in regard to the future profits of a boat, or of any trade or business; evidence relating thereto is always excluded upon the ground of its being remote, uncertain and speculative.

We see no error in the instructions given by the court, nor do we think the court erred in refusing the third and fourth instructions of defendants. The third instruction was substantially given in the second instruction of the plaintiff, and there was no evidence in the cause to warrant the fourth instruction.

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Upon the whole, we think the verdict is for the right party, and fully supported by the evidence. The other judges concurring, the judgment will be affirmed, with ten per cent. damages.

SAMUEL V. CLARK, Appellant, v. FRANCIS ROGERS, Respondent.

Practice.—Judgment affirmed for the reason that the appeal was frivolous.

Appeal from St. Louis Law Commissioner's Court.

BATES, Judge, delivered the opinion of the court.

This suit, which is for a very small amount, originated in a justice's court, where the defendant had judgment. It was carried to the St. Louis Law Commissioner's Court, where the defendant again had judgment, and the plaintiff appealed to this court.

The bill of exceptions shows some testimony given at the trial, but does not show that it was all the testimony given. It shows that the plaintiff objected to testimony given by the defendant, but does not show the grounds of objection. No exception was taken to the declarations of law given by the court. The appeal is frivolous.

Judgment affirmed. Judges Bay and Dryden concur.

THE STATE, Respondent, v. FRED. BIEBUSCH, Appellant.

Indictment—Bribing witness.—In an indictment, under Sec. 9, Art. V., Ch. 50, R. C. 1855, p. 601, it is not necessary to state that the testimony of the witness was material, nor that he had been summoned as a witness. Nor is it necessary to charge that the attempted bribery was with intent to impede and obstruct the due course of justice. Nor is it necessary to state the kind or amount of money or property offered to the witness. Nor is it necessary to state the intent of defendant. And when the attempt was made to induce a witness to absent himself, so as to prevent his giving testimony before a justice of the peace in a criminal proceeding, it will be sufficient to allege that the justice had jurisdiction of the matter heard before him.

Appeal from St. Louis Criminal Court.

James C. Jones, for appellant.

I. The count under which defendant was convicted was defective. (R. C. 601, Art. 5, § 9.) The essence of the offence was obstructing the due course of justice.

It does not allege that the testimony of Polk was material.

It does not allege that a subpœna or other process had been, or was about to be, issued or served upon Polk.

The simple averment that Polk was a witness was not sufficient, unless it be shown that he had been notified, or was relied upon. (Wharton's Prec. 606; 2 Bouv. L. Dic. 658; Burr. L. Dic., tit. Witness.)

II. It is not alleged that the justice was at the time an acting justice of the peace. Such an averment in an indictment for perjury is necessary. (Reg. v. Rawlings, 8 C. & P. 349.)

III. The allegation that the defendant "did directly or indirectly attempt," is bad for uncertainty and duplicity.

IV. It is not alleged that the attempted bribery was done with the intent to obstruct and impede the due course of justice. (State v. Lovett, 3 Verm. 110.)

V. If money or property was offered or paid by way of bribery, the kind and amount should be alleged. (Moore v. State, 6 Conn. 9; 7 Ired. 52.)

VI. The nature and character of the offence with which defendant stood charged before the justice is not sufficiently alleged, nor is it alleged that defendant was guilty of the charge.

Voullaire, for the State.

I. The materiality of the testimony of the witness Polk is not the question; the statute says "any witness." (State v. Early, 3 Harrington, 562; Whart. Crim. L. 763; State v. Johnson, 7 Blackf. 49; State v. Hall, 7 Blackf. 25.)

II. It was not necessary to state that the witness was

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subpœnaed, or that a subpœna issued for him. (State v. Keys, 8 Verm. 57 ; Commonwealth v. Knight, 12 Mass. 274.)

It was sufficient to state that defendant knew that Polk was a witness for the State. (State v. Carpenter, 20 Verm. 9.)

III. The indictment strictly follows the language of the statute. (State v. Holding, 1 McCord, 31 ; State v. Vaughan, 4 Mo. 530.)

BATES, Judge, delivered the opinion of the court.

The defendant was indicted in the St. Louis Criminal Court for attempting to bribe a witness. He was tried and convicted. Objections were made in the Criminal Court to that count of the indictment under which he was convicted, which were overruled by the court, and he now seeks to reverse the judgment for the insufficiency of the indictment.

The indictment charged that he "unlawfully and corruptly did, directly and indirectly, attempt, by bribing, to induce one William M. Polk to absent himself for the purpose of avoiding giving evidence in a certain cause, matter and proceeding, then duly pending before Philip McDonald, one of the justices of the peace of the county of St. Louis, in and for the ninth ward of the city of St. Louis, in said county, wherein the State of Missouri then was the plaintiff, and he, the said Fred. Biebusch, then was the defendant ; wherein the said Fred. Biebusch then stood charged with a certain felony, to-wit, forgery in the second degree, and in which said cause, matter and proceeding, he, the said William M. Polk, then was a witness for and in behalf of the State of Missouri, and against him, the said Fred. Biebusch, and of which said cause, matter and proceeding, he, the said Philip McDonald, justice of the peace as aforesaid, then and there had competent jurisdiction for the preliminary examination thereof. And so the grand jurors aforesaid, upon their oath aforesaid, do say that he, the said Fred. Biebusch, then and there, well knowing him, the said William M. Polk, to be a witness for and in behalf of the State of Missouri in the cause, matter and proceeding aforesaid, then pending before Philip McDonald,

justice of the peace as aforesaid, unlawfully and corruptly, did, directly and indirectly, attempt, by bribery, to induce him, the said William M. Polk, witness as aforesaid, to absent himself for the purpose of avoiding giving evidence in the cause, matter and proceeding aforesaid against him, the said Fred. Biebusch, against the peace," &c.

The indictment is founded upon the 9th sec. of the 5th art. of the act concerning crimes and punishments, (1 R. C. 601.) It is objected to the indictment—

1. That it does not state that the witness' testimony was material, nor that he had been summoned as a witness.

2. That it is not charged that the justice of the peace, before whom the proceeding was pending, was an acting justice.

3. That it is not charged that the attempted bribery was with intent to impede and obstruct the due course of justice.

4. If money or property was offered as a bribe, the kind and amount thereof should have been stated.

5. The nature of the offence with which the defendant stood charged before the justice is not sufficiently set forth, nor is it alleged that the defendant was guilty of said charge.

None of these objections are good. The law defining the offence refers to any witness, whether his testimony be material or not, or whether he be summoned or not.

It is averred that the justice had jurisdiction of the matter, and our law knows no justices but acting justices.

The intent with which the defendant attempted to induce the witness to "absent himself for the purpose of avoiding giving evidence" is of no importance further than as it is alleged. The crime consists in the attempt, and not in the intent of the attempt, and it was unnecessary to allege that it was with intent to impede the due course of justice. And so, also, it is of no importance what was the kind and amount of the bribe, or what was the nature of the case pending before the justice—which is, however, very plainly charged.

Judgment affirmed. Judges Bay and Dryden concur.

DAVID F. GOODFELLOW'S EXECUTORS, Respondents, v. JAMES
MEEGAN, Appellant.

Bailment—Negligence.—In an action to recover for the pasturing of cattle, some of which were not returned by the bailee, it is incumbent upon the plaintiff to prove that he used the degree of diligence required of him by his contract. The degree of diligence required depends upon the terms of the contract.

Evidence.—It was improper to permit witness to state that it was *not* the custom to make contracts of a particular character, which were not illegal and which the parties were competent to make.

Appeal from St. Louis Law Commissioner's Court.

On the 12th May, 1859, two suits were brought against James Meegan, before Peter W. Johnstone, a justice of the peace; one in favor of David F. Goodfellow's executors, for thirty-five dollars and forty-five cents, for grazing oxen from July 28, 1858, to September 18, 1858; and the other suit was in favor of Mary G. Goodfellow, for eleven dollars and fifty five cents, for grazing oxen from September 18, 1858, to October 21, 1858. James Meegan filed before the said justice an offset in each case—in the first suit as above, for seventy dollars, being the alleged value of two oxen, delivered to said Goodfellow in his life-time, which said Goodfellow was to pasture and redeliver to said Meegan, but which were not returned, though demanded; and in the last named suit, an offset for thirty-five dollars, for one ox lost and not returned or accounted for of oxen mentioned in plaintiff's account. By agreement of all the parties, the two cases were consolidated and merged into one. The case was tried before the justice, and judgment rendered against James Meegan for forty-seven dollars. James Meegan appealed to the Law Commissioner's Court, where the case was tried at the August term, 1859, and resulted in a judgment against said Meegan for thirty-five dollars and forty-five cents.

David F. Goodfellow died September 18, 1858, leaving a last will and testament, in and by virtue of which he appointed John W. Burd and William C. Jamison his executors and

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devises, and bequeathed all his property to said Burd and Jamison as trustees, for the benefit of his widow, the said Mary G. Goodfellow, during her natural life, with remainder to his children. After his death, his widow continued to reside and carry on the farm, in the county of St. Louis, about six miles from this city.

There was evidence proving plaintiff's case.

The defendant attempted to show a special contract between Goodfellow and Meegan, made on his behalf by one James A. Husbands, who testified that Goodfellow told witness that he had two pastures; and showed one, on the left hand side of the road, where Goodfellow said he would pasture at the owner's risk; but that if witness would put the cattle in the pasture on the right hand side, he, Goodfellow, would see that the cattle were there whenever they should be called for. Witness understood that if the cattle were lost or stolen, Goodfellow would pay for them, but did not know what was Goodfellow's understanding. The price to be paid for pasturing was two dollars a head a month. It appeared that three of the oxen broke down the fence and got away.

In rebuttal, Michael Redman, a witness for plaintiff, was called and asked the following questions: What the custom was in regard to pasturing cattle in the vicinity where these cattle were pastured; and who usually took, according to custom, the responsibility of keeping the cattle safely? Whether the person pasturing ever undertook to do it? To which defendant objected, on the ground that a special contract had been proved; which objection was overruled, to which defendant excepted. Witness stated that, in the neighborhood, it was not the custom of pasturers to become responsible for cattle; that he never knew of cattle being pastured in that way, at the rate of two dollars a head per month, in that vicinity. Witness was then asked whether the cattle in question were not breachy, and other questions to the same effect, to which defendant objected as incompetent in view of the contract proved by defendant. The court

overruled the same, to which defendant excepted. Witness then testified that some of the cattle were breachy; that he saw two of them, on two occasions, break down the fence of the pasture, and that he called any cattle breachy that would break down any fence.

The defendant asked the following instructions:

1. That if the court, sitting as a jury, believe this was a common contract of pasturage, with no special understanding as to the safe keeping, then this is an ordinary contract of bailment for hire, and Goodfellow was, by law, bound to ordinary care, and liable for ordinary negligence. And if the court, sitting as a jury, believe that the cattle were lost during the bailment, then, as plaintiffs sue for the price of the bailment, they are bound to show, before they can recover, that the lost cattle could not have been preserved by the exercise of ordinary care and diligence.

2. That if the court, sitting as a jury, believe that it was agreed between Goodfellow and defendant's agent that the cattle should be put, and in pursuance of that agreement the cattle were put by defendant's agent, into a particular specified pasture; and that, afterwards, the pasture was changed without the consent of defendant, and the cattle put into another pasture, and that some of these cattle were missing and not returned to the defendant, then plaintiff cannot recover in this action.

3. That if the court, sitting as a jury, believe that, at the time the agreement was being made, Goodfellow said to the defendant's agent that he, Goodfellow, would see that the cattle were forthcoming when called for, or words to that effect, he thereby bound himself, as a bailee, to use the highest degree of care and diligence; and if the court, as a jury, believe that some of the cattle were not forthcoming, but were lost to the defendant, then the burden of proof is on the plaintiff to show that such cattle could not have been made forthcoming by the exercise of the highest degree of care and diligence.

4. That if the court, sitting as a jury, believe that, at the

time the contract for pasturage of the cattle was being made, defendant's agent drew attention to the safe keeping of the cattle, and Goodfellow said to the defendant's agent that he, Goodfellow, would see the cattle were there in the pasture when called for, if they were put in the right hand pasture; and that under agreement made at that time the cattle were put in the right hand pasture, then this amounted to an understanding on the part of Goodfellow to have the cattle in the pasture when called for, except in case of their death, or loss from some cause beyond human care and precaution.

The court refused to give said instructions, to which defendant excepted.

The plaintiff asked the following instruction :

"The court declares the law to be, that if the plaintiff took the cattle of the defendant for the purpose of pasturing the same, and that he did so pasture the said cattle, and that the sum charged therefor is reasonable, the plaintiffs are entitled to recover."

The court refused to give said instruction.

The court, on its own motion, gave the following instruction :

"The account herein filed, of Mary S. Goodfellow against James Meegan, cannot be regarded as considered by the court, as a jury, in the decision of this cause."

C. S. Hayden, for appellant.

I. The agistor sues on a contract which binds him, like other bailees for hire, to ordinary care, and makes him responsible for ordinary negligence. It being shown that three of the cattle were lost, the plaintiff was bound to prove that they were not lost by his negligence. (*Rey v. Toney*, 24 Mo. 600.)

II. In regard to the admission of illegal testimony, no argument can be as strong as a statement of the facts. In contradiction of defendant's evidence to prove a special contract—to permit plaintiffs' witnesses to testify that it was *not* the custom to make special contracts at all, and above all such contracts, was illegal.

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Lackland, Cline and Jameson, for respondent.

- I. There was no special contract proven by appellant.
- II. The evidence of a custom in the vicinity was competent to rebut the evidence tending to show a special contract.
- III. It was incumbent upon the defendant to prove the negligence of the plaintiff. (*Rey v. Toney*, 24 Mo. 600; *Foot v. Starrs*, 2 Bart., S. C., 329; 2 Story on Cons., § 742.)

BATES, Judge, delivered the opinion of the court.

The cattle having been bailed by Meegan to Goodfellow, to be pastured by him for hire,—in this suit for the hire, it having been charged and proved that some of the cattle were not returned by Goodfellow to Meegan, it was incumbent upon Goodfellow's executors to show that the loss of the cattle was not occasioned by his default. In other words, that he had used the degree of diligence required of him by his contract. The degree of diligence would depend upon the terms of the contract; but, whether it be ordinary or extraordinary, it was the burden of the plaintiffs to show that it was exercised. By the refusal of all of the instructions asked by the defendant, the court below seems to have assumed that Goodfellow was in no event responsible for the safe keeping of the cattle, even though they might have been lost by his gross negligence. This was error.

As to the proof of what were the terms of the contract, they might be proved by direct evidence; or, if it be proved that the contract was made so general as not to specify the particular terms from which the liabilities of the parties result, perhaps evidence might be given of a common understanding and usage, known to the defendant, that such general contracts implied certain specific terms. As the evidence of custom was given in this case, it was improper. It was only that it was *not* the custom to make certain contracts which were not illegal, and which the parties were competent to make. Such testimony is no evidence that a contract of that unusual character had not been made in this instance.

Judgment reversed and cause remanded. Judges Bay and Dryden concur.

HENRY CLAMORGAN *et al.*, Defendants in Error, v. ISAAC T. GREENE, Plaintiff in Error.

Estoppel.—Where, in a deed conveying an unconfirmed claim to land, without any warranty of title, both parties had recited, that the grantors in the deed were the owners of the claim as the only surviving heirs and devisees of the assignee by purchase from the original claimant, they are estopped from denying the truth of such recitals.

Contract.—Plaintiffs having an unconfirmed claim to lands, released the same to the defendant, he undertaking to prosecute the claim at his own expense, and for which he was to pay, if successful, a sum stipulated. The deed *inter parties*, also stipulated that after confirmation the land was to be considered as mortgaged for the consideration money. The defendant prosecuted the claim which was confirmed by Congress. *Held*, that when the claim was confirmed, the consideration became due.

Evidence.—When the defendant alleged that he had been deceived by the fraudulent misrepresentations of the plaintiffs, an unexecuted agreement between plaintiffs and defendant, which the latter had taken to his attorney for the purpose of having a proper agreement drawn, was correctly admitted in evidence in connection with other testimony, to show that defendant knew the facts which he alleged had been fraudulently concealed by the plaintiffs.

Error to St. Louis Circuit Court.

The facts are sufficiently stated in the opinion of the court.

The paper in the handwriting of Mr. Dayton, referred to, was an unsigned deed between the parties, similar to the instrument sued upon, which recited that the plaintiffs were interested in the claim with the heirs of their deceased brother, Louis Clamorgan. It was shown that defendant took this paper to his attorney for the purpose of having an instrument drawn to suit himself, which was the one sued upon.

Defendants offered evidence to show that Jacques Clamorgan had, in his life-time, sold the claim of Loisel, which evidence the court excluded.

W. T. Wood, for plaintiff in error.

I. The court wrongly excluded evidence offered by the defendant. The defendant was not estopped from showing that Jacques Clamorgan, in his life-time, had parted with his title,

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and that the plaintiffs were not the legal representatives of Regis Loisel. (1 Smith's L. C. 81; 1 Plowd. 134, *n.*)

II. The claim has not been prosecuted to a successful issue; the land has not been obtained. And the question, who are the legal representatives of Regis Loisel, under the act of Congress, is still to be determined.

The passage of the act of Congress did not give a successful issue; the delivery of the certificate of re-location was indispensable.

III. The paper in the handwriting of Mr. Dayton, testified to by Mr. Gantt, was wrongly admitted for plaintiff.

Lackland, Cline & Jameson, for defendant in error.

I. The successful issue intended by the deed was a confirmation by act of Congress. (Act Con. 1857-8, p. 294, Ch. 81, and p. 87, Ch. 51.)

II. The defendant was estopped from denying the recitals of the deed; and, therefore, the testimony offered by defendant to show that Jacques Clamorgan had, in his life-time, parted with his interest in the Loisel claim was properly excluded. (Dickson v. Anderson, 9 Mo. 156; Jæckel v. Easton, 11 Mo. 118.)

III. The paper in Dayton's handwriting was properly admitted to bring home to the defendant knowledge of the facts he alleged to have been fraudulently concealed.

IV. The defendant took the claim at his own risk; and the plaintiffs have given no warranty, but only a release and quitclaim.

BATES, Judge, delivered the opinion of the court.

The petition in this case is as follows:

The plaintiffs state, that, on the 16th of February, 1852, an agreement in writing was entered into and duly signed and sealed by and between the plaintiffs and the defendant, which agreement is here copied, and reads as follows:

"Whereas Jacques Clamorgan, late of St. Louis, Missouri,

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had, in his life-time, a claim to one hundred and fifty thousand one hundred and sixty-two arpens eighty-five perches of land, which had been granted by Don Carlos Dehault Delassus to Regis Loisel, on the 25th of March, 1800, and was afterward purchased of Regis Loisel by said Jacques Clamorgan; and whereas Henry Clamorgan and Cyprian Clamorgan are the grandsons and only surviving grand children and devisees of said Jacques Clamorgan; and whereas the tract of land containing the above number of arpens was never confirmed by any of the boards of commissioners acting under authority of the laws of the United States, but the claim being presented to the board sitting in St. Louis, in the year 1834, for the adjudication of titles to land, was by the said board rejected because the same was beyond the limits of the State of Missouri—the said grant being, in truth, on an island in the Missouri river, above the north-western boundary of the State of Missouri; and whereas Isaac T. Greene is desirous of prosecuting the said claim for his own use and benefit, and at his own proper cost; therefore, in consideration of the covenant of the said Isaac T. Greene to pay to the said Henry and Cyprian Clamorgan, in case of a successful issue to his prosecution of said claim, the sum of six thousand dollars, the said Henry Clamorgan and Harriet his wife, and Cyprian Clamorgan, bargained, sold, transferred, enfeoffed, assigned, relinquished, and set over to the said Isaac T. Greene, and his heirs and assigns forever, all their right, title, claim, interest, estate and property of, in and to the aforesaid tract of land, for a more particular description of which reference is hereby made to the plat of survey made thereof by Antoine Soulard, and on file in the office of the recorder of land titles for Missouri; to have and to hold the aforesaid tract of land to him, the said Isaac T. Greene, and his heirs, forever. It is hereby witnessed that the said land, after confirmation, shall be considered as mortgaged to the said Henry and Cyprian Clamorgan to secure the payment of the said sum of six thousand dollars; and it is further witnessed that nothing therein contained is to be construed into a warranty of the

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title to said land, except that the said Henry and Cyprian have not sold or disposed thereof to any other purchaser.

"In witness whereof the said parties have hereto set their hands and seals, the sixteenth day of February, in the year eighteen hundred and fifty-two.

HENRY CLAMORGAN, (L. S.)

HARRIET CLAMORGAN, (L. S.)

CYPRIAN CLAMORGAN, (L. S.)

ISAAC T. GREENE, (L. S.)"

And the plaintiffs allege, after said written agreement was made and executed, that defendant made endeavors to have the claim in said agreement mentioned confirmed by the Congress of the United States, and thereafter said claim was confirmed by an act of Congress entitled "An act for the relief of Regis Loisel, or his legal representatives," approved 24th of May, 1858; and also by an act entitled "An act to provide for the location of certain confirmed private land claims in the State of Missouri, and for other purposes," approved 2d June, 1858. Whereupon, in consequence of such successful issue of said claim, the defendant became liable to pay to the plaintiffs the sum of six thousand dollars in said agreement covenanted to be paid by the defendant to the plaintiffs. The defendant has been requested to pay said sum of money and has refused, and the plaintiffs ask judgment therefor, with interest thereon from the 24th of May, 1858.

The defendant in his answer charged that he was induced to enter into the agreement set forth in the petition by false and fraudulent representations made by the plaintiffs. The defendant also denied that the passage of the acts of Congress mentioned in the petition brought the prosecution of said claim to a successful issue. At the trial, it was proved that the defendant did prosecute before Congress the claim which was confirmed by the acts of Congress mentioned. Evidence was also given tending to show that some of the matters which the defendant contended were meant by recitals contained in the agreement were false, and some evidence that the defendant knew of their falsehood. No evidence is pre-

served that the plaintiffs made to the defendant any false representation.

The court gave the following instructions :

1. If plaintiffs induced defendant to enter into the contract sued upon by reason of false and fraudulent representations, as alleged in the answer, they cannot recover in this suit.

2. If Isaac T. Greene, the defendant, after the execution of the instrument in writing set out in the petition, made endeavors to have the claim in said instrument mentioned confirmed by the Congress of the United States prior to the passage of the acts of Congress mentioned in the petition ; and if the claim mentioned in said instrument of writing is the same mentioned in said acts of Congress as the Regis Loisel claim, then the defendant is liable to pay the plaintiffs six thousand dollars, with interest at the rate of six per cent. from the commencement of the suit to the present time, and so the jury should find.

To which instructions defendant objected, and to the giving of which defendant at the time excepted. Defendant thereupon prayed of the court instructions to the jury as follows.

The court refused the following instructions asked by the defendant :

1. That the mere confirmation of the grant to Regis Loisel or his legal representatives, as enacted and provided in the acts of Congress given in evidence to the jury, without further proof of further action on the part of the government in perfecting and completing right and title under said acts, as provided for in said acts, is not sufficient to entitle plaintiffs to recover in this action.

2. That there is no evidence before the jury to entitle plaintiffs to recover in this action.

3. That if the jury find from the evidence that plaintiffs are not, and at the time of the making of the agreement sued on were not, the only heirs and representatives or devisees of said Jacques Clamorgan, but that said plaintiffs had a brother who died leaving children alive, and were living at the time of making this contract, and still are living, then, in such

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case, the jury can only find a verdict against defendant proportioned to the interest of two thirds, claimed by said plaintiffs in and to said grantor's claim.

4. If the jury believe from the evidence that, at the time of the making of the agreement sued on, plaintiffs knew that the children of their brother Louis were living and entitled to their father's share in the grant and land mentioned in the agreement, and, knowing this fact, did not inform defendant thereof, such concealment and suppression of said fact was a fraud on defendant.

The first ground of defence was that the defendant was induced to enter into the agreement by the false and fraudulent representations of the plaintiffs. There was no evidence to support this defence, yet the court did instruct the jury that if such were the case the plaintiffs could not recover. Plainly, the defendant cannot complain of the action of the court in that matter.

The second ground of defence was, that the acts of Congress given in evidence did not show "a successful issue to his (defendant's) prosecution of said claim." From the language of the agreement, it is plain that the successful issue to which the parties looked was a confirmation of the claim, for, after the confirmation, the money was considered to be owing, and secured by mortgage of the land confirmed.

The act of Congress confirmed the land to Regis Loisel or his legal representatives, with a proviso that if any portion of it had been located under a law of the United States by any other person, or had been sold by the United States, the confirmee could relocate so much on other lands. Evidence was given that the defendant endeavored to have that act of Congress passed, and the court left it to the jury to find whether the defendant did so endeavor; and, also, whether the claim so confirmed was the same as that mentioned in the agreement. The jury found the claim to be the same; and that the defendant made endeavors to have it confirmed. The statements in the agreement (which bind the defendant as well as the plaintiffs) that Jacques Clamorgan, in his life-

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time, had that claim by purchase of Loisel, and that the plaintiffs were the only surviving grandsons and devisees of Jacques Clamorgan, cannot be controverted by the defendant. Under these circumstances, judgment must necessarily have gone for the plaintiffs; and there was no error in the second instruction given.

In this view of the case, the instructions prayed by the defendant were properly refused. The evidence offered by the defendant and excluded, was properly excluded, because it only tended to deny the statements in the agreement, which he was estopped from denying.

The paper given in evidence by the plaintiffs, in the handwriting of Mr. Dayton, was properly admitted in connection with Mr. Gantt's testimony, to show that the defendant was aware of facts which, in his answer, he contended he was ignorant of, and which were fraudulently concealed from him.

Judgment affirmed. Judges Bay and Dryden concur.

JOHN P. GOULD *et al.*, Respondents, v. GEORGE TROWBRIDGE
et al., Appellants.

Evidence—Lost Instrument.—The testimony of a party to prove the loss of an instrument may be taken by deposition with the same effect as if he had been placed upon the stand. But the affidavit of the party to prove such loss is inadmissible. Before such testimony can be admitted, the previous existence of the instrument must be shown by other evidence.

Appeal from St. Louis Circuit Court.

H. N. Hart, for appellants.

J. C. Moody, for respondents.

DRYDEN, Judge, delivered the opinion of the court.

The petition in this case alleges, among other things, that one Alexander Powell, at Cincinnati, Ohio, on the 23d of

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August, 1848, drew his bill of exchange on the defendants, Trowbridge & Priest, and requested them to pay to the firm of Gould, McCracken & DeGraff, of whom the plaintiffs are the survivors, eight months after date, at the Bank of Missouri, St. Louis, the sum of \$1,496.47; that before the maturity of the bill the defendants duly accepted it; that at maturity demand was made, payment refused, protest and notice, and subsequent death of DeGraff; and as an excuse for not filing the bill with the petition, its loss or destruction was averred. The defendants answered, denying every material allegation of the petition, but setting up no new matter. The trial of the case was submitted to the court, and a verdict and judgment for the amount of the bill and interest were rendered for the plaintiffs. On the trial, the plaintiffs, by way of laying the foundation for the introduction of secondary evidence of the contents of the bill, among other evidence for the same purpose, read first the petition in this case together with the affidavit thereto of McCracken, one of the plaintiffs, and second, so much of a deposition of the plaintiff Gould taken in the cause as bears upon the question of the loss of the bill. The plaintiffs also, to prove the co-partnership of Gould, McCracken & DeGraff, and the death of the latter, read the deposition of one Burton.

The plaintiffs also read in evidence two affidavits in support of motions for continuances, one made by Trowbridge and the other by Priest, at different terms of the court pending the action—all which evidence was admitted against the objection and exceptions of the defendants. There were no declarations of law asked or refused on^e the trial. After verdict the defendants asked for a new trial, which was refused and they excepted. The only question in the case is, as to the admissibility of the testimony objected to.

1. The grounds of objection to the introduction in evidence of the petition and affidavit of McCracken and deposition of Gould, are not disclosed in the record; we will therefore only consider the question of their competency. That a party to a suit is competent to prove the loss of a paper by way of

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laying the foundation for the introduction of secondary evidence of its contents, provided it was lost out of his own custody, is so well settled by the practice of the courts as to admit of no question. Ordinarily the proof is made by calling the party at the trial, but it may be made just as well by his deposition. There is no reason for the exclusion of the deposition in such case that would not equally apply in any other.

The mode of making the proof by means of the petition and affidavit was improper, and not sustained by the practice of the courts.

Preliminary to the oath of the party in such cases, he must adduce some proof showing that the lost document had had a previous existence.

This preliminary evidence is furnished in this case by the letter of the defendants, dated St. Louis, April 14th, 1849, (a few days before the maturity of the bill,) addressed to Gould, McCracken & DeGraff, in which they say, "we have to write you with reference to *our acceptance* in *your* favor for fourteen hundred and ninety-six dollars and forty-seven cents, falling due at Bank Missouri on the 26th instant, and to inform you, with regret, our inability at present to retire the same. You are, no doubt, aware of our having sustained loss through the dishonesty of Alexander Powell, the *drawer of this draft*," &c., &c.

The same letter discloses the fact that Trowbridge, one of the defendants, had shortly before gone to California. After reading this letter, in connection with the deposition of Gould, and the petition and affidavit of McCracken, the plaintiffs read a deposition of one R. P. Effinger, which tended to prove that he had received the draft for collection in San Francisco from the plaintiffs, and that before he had taken any legal measures for its collection, he had placed it in the hands of the law firm of Weller, Jones & Kinder, in San Francisco, and returned east. The plaintiffs also in this connection read the deposition of Mr. Weller, of the San Francisco law firm, whose evidence tended to prove the de-

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struction of the draft in a fire that consumed the office and books and papers of the witness. From this review of the testimony it is manifest that, whether the evidence of the parties was properly or improperly admitted, the defendants were not harmed by its introduction, since the loss of the bill was abundantly shown by the evidence of Effinger and Weller. The error, then, in admitting the petition and affidavit in evidence, having done the defendants no harm, we cannot for such error reverse the judgment. (R. C. 1855, p. 1300, sec. 34.)

2. There is no ground of objection apparent to the deposition of Burton, and the defendants disclose none in the record. We will therefore give the exception no consideration.

3. The affidavits of the defendants which were read by the plaintiffs are objected to on the ground that they are "incompetent and illegal." Upon what principle it can be claimed that they were incompetent or illegal as evidence against the parties who made them, in the cause in which they were made, and about the very matters in controversy, it is difficult to see. The answer in the case utterly denied that the defendants had ever accepted the bill declared on in the petition, or any such; but in these affidavits for continuance the defendants, forgetful of the unqualified denials of the answer, distinctly admitted the acceptance, and to defeat the action on a ground not relied on in the answer, sought to continue the trial to procure evidence which they said with proper indulgence they could procure, to prove that the plaintiffs had transferred the bill to other parties. The affidavits were competent and exceedingly pertinent on the issue as to whether the defendants accepted the bill.

The allegations of the petition were amply sustained by legal and competent evidence in the face of the denials in the answer, which, as shown by their own affidavits and the other proofs, they ought not in conscience to have made.

The judgment of the Circuit Court is affirmed, with ten per cent. damages; the other judges concurring.

CITY OF ST. LOUIS, Respondent, v. GERT GOEBEL, Appellant.

Notice—Service.—The authority to enforce a fine for a misdemeanor must be strictly construed. Therefore, where the ordinance required that the party should be served with notice, the notice must be served upon the person of the party to be charged.

No briefs on file.

BATES, Judge, delivered the opinion of the court.

This was a proceeding by the City of St. Louis, before the recorder of the city of St. Louis, to recover of Goebel a penalty for not removing a dangerous wall upon his premises.

The proceeding is founded upon an ordinance of the city in relation to the inspection of buildings and the prevention of fires. The fifth section of that ordinance declares that any person who shall fail or refuse to conform to the instructions of the inspector, provided for by the previous sections of the ordinance, shall be deemed guilty of a misdemeanor, and on conviction thereof fined, &c.; "provided, however, that such party shall be served with a notice in writing, setting forth distinctly some one of the dangers herein before stated, with instructions to remedy the same without delay."

At the trial of this case in the St. Louis Criminal Court, (to which court it was taken by appeal from the recorder,) a notice in writing was given in evidence as follows:

"*To Gert Goebel.* Sir: You are hereby notified that the southern wall of your premises on Geyer avenue, west of Seventh street, is in a condition to endanger life or injure property. You are required to have the same removed or otherwise properly secured within twenty-four hours from the time of receiving this notice, otherwise I shall proceed as directed by law.

Respectfully, &c.,

"J. E. D. COUZINS, Inspector."

The defendant admitted that that notice was delivered to his wife, at his usual place of abode, by the inspector, but did not admit the legality of the service, or that he ever, in

fact, saw or had knowledge of the notice. The Criminal Court held that the notice was sufficiently served.

This being a proceeding to enforce a fine against the defendant for a misdemeanor, the authority to do so must be strictly construed.

The ordinance says that "the party shall be served with a notice." A service upon any other person, however intimate her relations with the party may be, is not a compliance with the words of the ordinance, and we are not at liberty to presume facts in order to enforce a penalty upon a person against whom the facts are presumed.

Judgment reversed and cause remanded. The other judges concur.

JOHN L. ROSS, Appellant, v. HORATIO CLARK, Respondent.

Attachment—Absconding.—The actual absconding of a party from his usual place of abode, and taking up an abode in another State, supports an attachment upon the ground that the party has absconded, or absented himself from his usual place of abode, under s. d. 4, § 1 of the Attachment Act, R. C. 1855, p. 238.

Absconding—Evidence.—The fraudulently disposing of his goods in a clandestine manner is evidence against a party against whom an attachment issues, on the ground that the defendant has absconded, for the purpose of showing the intent of the absence.

Appeal from St. Louis Circuit Court.

The facts are sufficiently stated in the opinion of the court.

For the plaintiff the court gave the following instructions:

1. If the jury believe from the evidence that the defendant, at the time when this attachment was issued, had absconded from his usual place of abode in this State, so that the ordinary process of law could not be served upon him, they will find for the plaintiff.

2. If the jury believe from the evidence that at the time when this attachment was issued the defendant had absented himself from his usual place of abode in this State, so that

the ordinary process of law could not be served upon him, they will find for the plaintiff.

3. If the jury believe from the evidence that shortly previous to the issuing of this attachment the defendant had absented himself from his usual place of abode in this State, leaving his wife a mere boarder at a boarding-house, and that at the time when this attachment was issued she had left that place and gone home to her father, to reside temporarily in his family, and that the defendant did not come again into this State until after the return term of the attachment suit had passed over; then at said time he had no usual place of abode in this State, within the meaning of the statute, so that the ordinary process of law could be served upon him, and the jury will find for the plaintiff.

4. If the jury believe from the evidence that when the attachment was issued the defendant had absented himself from his usual place of abode in this State, and that he took up his permanent residence, at least for a time, in the State of Texas, and actually remained there, engaged in business in that State, for a period of nearly seven months thereafterwards; that he had no family but a wife, and that at the time when this attachment was issued she had gone home to her father, to reside temporarily in his family; then the defendant at said time had no usual place of abode in this State, within the meaning of the statute, so that the ordinary process of law could be served upon him, and the jury will find for the plaintiff.

For the defendant the court gave the following:

1. The burden of proof is on the plaintiff to establish the existence of the facts alleged by him as the grounds of his attachment. It is not sufficient that he had *good reason* to believe, and did *believe*, at the time of suing out his attachment, that the defendant had absconded or absented himself from his usual place of abode in this State, so that the ordinary process of law could not be served upon him; it must be proved actually to the satisfaction of the jury that the defendant had thus absconded or absented himself.

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2. The ordinary process of law contemplated by the statutes of this State is a writ of summons.

3. The mode of serving the ordinary process of law may be either, first, by reading the writ to the defendant; second, by delivering to him a copy of the writ; third, by leaving a copy of the writ at the usual place of abode of the defendant, with some white person of the family over the age of fifteen years.

4. If the jury shall believe from the evidence that, on the 3d day of January, 1859, the ordinary process of law could have been served upon the defendant by leaving a copy thereof at the usual place of abode of the defendant, with some white person of his family over the age of fifteen years, whether the defendant had at that time absconded or absented himself from such place or not, they will find the issue for the defendant.

5. Every casual and temporary absence of a debtor from his usual place of abode is not a legal ground for issuing an attachment against his property; it must be such as to prevent the service of ordinary process upon him.

6. The mere fact that a debtor is temporarily absent from the county of his residence, leaving no white person of his family over the age of fifteen years at his usual place of abode, will not authorize an attachment against his property.

The following instructions asked by the plaintiff were refused:

1. The jury are instructed that the statute allowing an attachment, "where the debtor has absconded from his usual place of abode in this State," bases the right to the attachment upon the personal misconduct of the debtor in withdrawing or absenting himself privately," which is the definition of *absconding*, and if the jury believe, from the evidence, that at the time when this attachment was issued the defendant had absconded from his usual place of abode in this State, so that the ordinary process of law could not be served upon him personally, they will find for the plaintiff.

2. The jury are instructed, that, in the sense of the law,

the usual place of abode of a man having a family, is the place provided for by him as the place of his and their permanent residence and domicile, and his and their home, from and to which he habitually goes and returns upon his ordinary avocations and business.

3. If the jury believe from the evidence, that shortly previous to the issuing of this attachment the defendant had absented himself from his usual place of abode in this State, leaving his wife a mere temporary boarder at a boarding-house kept by another person, and that he did not come again into this State until after the return term of the attachment writ had passed; that he had no family but a wife, and that at the time when this attachment was issued he had no permanent place of residence in this State provided for by him; as for his and her permanent home and residence, they will find for the plaintiff.

4. If the jury believe from the evidence, that at the time when this attachment was issued the defendant had absented himself from his usual place of abode in this State, and taken up his permanent residence, at least for a time, in the State of Texas, and that he actually remained there engaged in business in that State for a period of nearly seven months thereafterwards; that he had no family but a wife, and that, at the time of issuing this attachment, she was a temporary boarder at a boarding-house kept by another person; then the defendant, at said time, had no usual place of abode in this State, within the meaning of the statute, so that the ordinary process of law could be served upon him, and the jury will find for the plaintiff.

5. If the jury believe from the evidence, that at the time when this attachment was issued the defendant had absconded from his usual place of abode in this State; that he went to Texas and took up his residence in that State with the intention of permanently remaining there, at least for a time, and actually remained there engaged in business in that State for a period of nearly seven months; that he had no family but a wife, and that when he so absconded he left her a mere

temporary boarder at a boarding-house kept by another person; then at said time of issuing the attachment the defendant had no usual place of abode in this State, within the meaning of the statute, so that the ordinary process of law could be served upon him, and the jury will find for the plaintiff.

N. Holmes, for appellant.

I. In the sense of the law, "the usual place of abode of the defendant" means the fixed home and place of permanent residence of his family and himself, to and from which he goes and comes in his ordinary avocations and business; and the second and third instructions refused the plaintiff should have been given. (R. C. 1855, p. 1223, § 7, Attachment Act.)

It is the place where the defendant's family and himself "shall permanently reside in this State." (R. C. 1855, p. 732, § 53.)

Matter of Wrigley, 4 Wend. 602, S. C., 8 Wend. 134-9, Walworth, Ch.) "A mere residence of a temporary nature" is not enough: it must be "one of a permanent and fixed character," to constitute residence in law. "Inhabitaney or residence do not mean precisely the same thing as domicile," but they mean "a fixed and permanent abode or dwelling-place for the time being, as contradistinguished from a mere temporary *locality* of existence.

Place of abode, residence, domicile, means a man's *home*, to and from which he goes and returns daily, weekly, or habitually, from his ordinary avocations and business. (Chaine v. Wilson, 1 Bosw., N. Y., 673.)

Stratton v. Brigham, 2 Sneed, 420, "in the sense of the attachment laws, domicile means the same thing as residence, and is the home, a habitation fixed in any place without a present intention of removing therefrom." (Sto. Conf. Laws, § 43.)

II. Having given up his residence in St. Louis and absconded to Texas, for the purpose and with the intent of

taking up a permanent residence and place of residence there, and having actually established himself in business there, with intent to remain for the time being, it was of no sort of importance that his wife remained a temporary boarder in St. Louis; and the fourth and fifth instructions refused the plaintiff contained a correct exposition of the law of the case, and should have been given. (Sto. Confl. Laws, § 41.)

The difference between residence and domicil, in general law, is, that domicil adds to *residence* the intention of remaining permanently. (Sto. Confl. Laws, § 44.) This element of *permanency* is precisely what the statute (R. C. 1855, p. 732, § 53) has added to residence, in order to define the meaning of "the usual place of abode in this State;" and it is the permanent home provided by the party for himself and family, and where his family and himself "permanently reside." (Sto. Confl. Laws, § 43.) "That is properly the domicil of a person in which his habitation is fixed, without any present intention of removing therefrom." This is exactly what is meant by the statute. (Sto. Confl. Laws, § 47-8; Fuller v. Bryan, 20 Penn. 144; Houghton v. Ault, 16 How. Pr. R. 81-2.)

The cases of Temple v. Cochran, 13 Mo. 116; Kingsland v. Worsham, 15 Mo. 657; and Ellington v. Moore, 17 Mo. 424, are unlike this case in their essential features, being cases of a temporary absence merely, the defendants returning in time for service, and being actually served with process before the return day of the writ.

The moment this defendant left St. Louis, with intent to take up his residence in Texas, he ceased to be a resident here, or to have any usual place of abode in this State. (Drake on Attach. § 63; Clark v. Ward, 12 Grat. 440; Drake, § 64; Farren v. Barber 3 B. Mon. 217; Del Hoyo v. Brundred, 1 Spencer, N. J., 328.)

III. The fourth clause of the first section of the attachment act contains two distinct grounds of attachment; the one *in absconding*, based upon the personal misconduct of the debtor in secretly withdrawing himself beyond the reach

of any effective service of the ordinary process of law ; and the other in *absenting himself*, based upon the continuance of the absence, whereby the service of proces is effectually prevented ; and the plaintiff's first instruction should have been given.

Kingsland v. Worsham, 15 Mo. 661 ; Gamble, J. : "Regarding the clause as containing two distinct grounds of attachment, the first, or absconding, must subject the debtor to the process because of the character of his act in secretly withdrawing himself from his residence ; and the second, or absenting himself, must have the same effect because of its continuance." (Bennett v. Avant, 2 Sneed, 152.)"

IV. The court erred in excluding the evidence offered by the plaintiff to show misconduct on the part of the defendant, in clandestinely sending his goods to auction, preparatory to absconding ; it tended to show the character of his acts and conduct. (Kingsland v. Worsham, 15 Mo. 661.)

Colvin, for respondent.

The issue was whether the defendant had absconded or absented himself from his usual place of abode. The disposition he had made of his property was therefore immaterial, and the court committed no error in refusing to admit testimony to that point.

BAY, Judge, delivered the opinion of the court.

On the 3d of January, 1859, Ross sued out an attachment against Clark, alleging in his affidavit that defendant had absented himself from his usual place of abode in this State, so that the ordinary process of law could not be served upon him ; also, that he had absconded from his usual place of abode in this State, so that the ordinary process of law could not be served upon him. The writ was served by attaching the property of defendant. On the 5th of January an order of publication was made by the Circuit Court, and renewed on the 22d of March. On the 27th of September following defendant filed a plea in the nature of a plea in abatement,

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putting in issue the truth of the affidavit, and upon this issue the parties went to trial. The testimony given disclosed substantially the following facts: Clark was a dealer in paper and rags, on Second street, in the city of St. Louis, and had purchased largely from plaintiff. He had but one clerk, a young man by name of Paul, who testified that Clark left St. Louis on the 23d December, 1858, and stated to witness at the time he left that he was going to Leavenworth city, in Kansas, to obtain and bring to St. Louis the corpse of his brother. Witness had not before heard of the death of his brother. About a week after Clark left, the supposed dead brother made his appearance in St. Louis, in good health. Witness also testified that, before leaving, Clark told him that he would be back in two weeks or a month, and would write to him in about a week. Witness never heard anything from him, and did not see him again until about the 1st of August, 1859, seven months after his departure, when he met him on the street in St. Louis. Clark told him that he had been in Texas. When defendant left he gave witness no instructions whatever about his business beyond the time when he said he would be back; that, in point of fact, he gave him no particular directions, but simply left him as clerk in the store. Before defendant left, he and his wife were boarding at the house of a man by the name of Harbinson. Shortly afterwards she returned to her father and lived with him. They had no children, and had never kept house. Defendant left without letting any of his acquaintances know that he was going away. They made diligent inquiry in regard to him, but neither they or his father-in-law could learn where he had gone or what had become of him. After his return to St. Louis he stated that he had been in Texas, and had bought a ranche there, and had been living on it, and expected to live on it a few years longer, and then sell it. He expected to be in St. Louis but a few days. Mrs. Clark left Harbinson's and went to her father on the 8th of January, 1859.

Upon the foregoing facts the jury, strange to say, found

the issue for the defendant; but upon what theory or hypothesis, it is difficult to conjecture. The evidence established the truth of the affidavit beyond any cavil or doubt.

It was not a case in which a jury is called upon to determine in whose favor the evidence preponderates, for it was all on one side, and leading to but one conclusion. It is not the case of a debtor who is temporarily absent on business, and which absence may prevent the service of a summons, but it presents the case of a party who actually abandons his residence and takes up his abode in a distant State, secretly and clandestinely, not even imparting his intention to his wife, father-in-law, or any of his friends. If such a case does not furnish a good ground for an attachment, we are at a loss to conceive what case would.

The court gave four instructions in behalf of the plaintiff and six for the defendant, but we find nothing in these instructions which could have led the jury into such an erroneous finding. The plaintiff asked several instructions which the court refused to give, but we have not deemed it necessary to pass upon them, as the instructions given fully advised the jury of the law of the case.

Upon the trial, plaintiff offered to prove that defendant was largely indebted, and that a day or two previous to his leaving St. Louis he sent from his store, to an auction room, large packages of goods, and sold large lots of goods in an unusual and clandestine manner, and at under prices. Defendant objected to the introduction of such testimony, and the objection was sustained by the court. We are of opinion that the testimony was admissible, not for the mere purpose of showing a fraudulent concealment or disposition of his property to hinder or delay his creditors, for that was not a cause assigned in the affidavit upon which the attachment issued, but for the purpose of showing the intent with which he left St. Louis.

A man leaving home on business, with the intention of soon returning, would not be likely to dispose of his property secretly, and at prices far below its value. The very fact of

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converting a large amount of goods into money, by auction sales, and at a large sacrifice, and in a clandestine manner, furnished a reasonable presumption, particularly when viewed in connection with the other facts of the case, that he intended to abscond or absent himself so as to avoid the service upon him of the ordinary process of law.

The other judges concurring, the judgment will be reversed and the cause remanded for further trial.

CALLAWAY MINING AND MANUFACTURING COMPANY, Respondent, v. GEORGE W. CLARK *et al.*, Appellants.

Damages.—The measure of damages for the taking and detention of personal property will be the actual damages sustained by the seizure; the question of speculative profit or loss cannot enter into the estimate. Where a steamboat was seized, *held*, that the jury should not be allowed to speculate as to what might be the probable or expected profits or earnings of the boat. (Taylor v. Maguire, 12 Mo. 313.) Cited and approved.

Corporation—Powers.—Every corporation in this State has power to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in the charter. Therefore, a corporation created for the purpose of mining and transportation of coal, etc., had the power to purchase and use a steamboat for the purposes of its business in transporting and delivering coal, etc.

Appeal from St. Louis Circuit Court.

The defendants, by virtue of an attachment in their favor against one Roberts, had seized a steamboat belonging to the plaintiff, used in transporting coal from the plaintiff's railway and mines to Jefferson city. Roberts pleaded in abatement of the attachment, and the suit was dismissed. The plaintiff sued to recover damages for the seizure and detention of the boat. At the trial evidence was offered tending to show that the plaintiff had laid up their boat, and that it would not have been used during the period of detention.

The answer denied the corporate existence of plaintiff, the ownership of the boat, its wrongful seizure and detention,

and alleged that it was not enrolled or licensed to run as a steamboat, and pleaded a counter-claim.

The ownership of the boat was proved by parol testimony.

The court gave the following instruction for the plaintiff:

"If the jury believe that the defendants sued one A. S. Roberts, Jr., in this court, by attachment, in October, 1857, and caused a writ of attachment to be issued to the sheriff of Callaway county, and said writ was placed in said sheriff's hands to be executed; and that in December, 1857, the steamboat Dubuque was, at the instance of said defendants, seized under said writ by the sheriff of Callaway county, and taken and detained out of plaintiff's possession; and that said boat, at the time of said seizure, was the property of the plaintiff, and was in its employ when seized,—then the jury will find for plaintiff such damages as from the evidence they may believe it has sustained by the seizure of said boat."

The fifth and sixth instructions asked by defendants and refused, were as follows:

5. There is no evidence in this case that the plaintiff was the owner of the steamboat Dubuque on the fourth of November, 1857, when the boat was attached at the suit of the defendants.

6. The Callaway Mining Company could not own a steamboat at any time during the month of November, 1857.

The other instructions are referred to in the opinion.

A. M. & S. H. Gardner, with *S. Knox*, for appellants.

I. The plaintiff was a corporation possessing no powers except such as were granted by the act of incorporation. (*Beatty v. Lessee of Knowles*, 4 Pet. 152; 18 Ohio, 151; 16 Ohio, 97; *Ang. & Ames on Corp's*, § 160, 256, 111.)

The act of incorporation gives no authority to plaintiff to own steamboats. (*Acts 1847*, p. 151.)

II. The first instruction asked by defendants and refused should have been given. The plaintiff sued for damages for being kept out of the use of the boat for thirty-three days, and for wages of hands during that time. If the boat could

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not have earned anything during that time, the damage sustained must have been nominal.

III. The second instruction of defendants, refused, should have been given. If the plaintiff did not intend to use the boat during the time it was detained, what damage could be sustained by being deprived of it?

Sharp, for respondent.

I. The plaintiff had the right to own and use the boat, by its charter and the general statute and law. (Acts 1847, p. 151; Acts 1857, p. 352; Acts 1855, p. 266; R. C. 1855, p. 369; 2 Kent, 280, 281; R. C. 1845, p. 231, § 1.)

II. What the boat could or might have earned is a matter of mere speculation, not to be estimated by the jury. (*Taylor v. Maguire*, 12 Mo. 313; S. C. 13 Mo. 517; *Blanchard v. Ely*, 21 Wend. 342.)

BAY, Judge, delivered the opinion of the court.

This suit was brought in the St. Louis Circuit Court to recover damages for the seizure by the defendants of a steamboat called "Dubuque," alleged to be the property of the plaintiff. The defendants, by their answer, put in issue plaintiff's corporate existence, also its ownership and possession of the boat, and deny its wrongful seizure and detention. They also set up a counter claim, consisting of a promissory note for three hundred and thirty-three dollars and thirty-five cents, alleged to have been executed by plaintiff payable to the order of defendants. Plaintiff filed a replication denying the execution of the note. Judgment was rendered for plaintiff, to reverse which appellants rely upon several points, which we will notice in the order presented by the record:

1. It is contended that plaintiff had no power, under its act of incorporation, to purchase or own a steamboat. The act of incorporation was obtained for the purpose of carrying on the mining and transportation of coal, etc.; and hence, in the third and fourth sections power is given to the company

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to construct and build a railroad or railroads from the coal lands in Callaway county to the Missouri river, at or near Côté Sans Dessein, and to acquire the right of way for the same. And by an amendatory act, approved March 5th, 1855, it is further provided that the company shall have power to purchase, hold and enjoy lands and tenements, hereditaments, goods, chattels and effects of what nature or kind soever, so far as needful, and purchased only for the carrying on of its business of mining and manufacturing in said county of Callaway; and the same from time to time to grant, bargain, sell, or otherwise dispose of, in the prosecution of the legitimate interests of their said business.

The evidence shows that plaintiff had a contract to deliver a certain quantity of coal at Jefferson city, and that the boat was used and employed for the purpose of conveying coal from the terminus of the railroad to Jefferson city and other points on the river, and for no other purpose whatever. It is not necessary to determine whether the power to own a steamboat is an incident to a corporation of this kind, in the absence of any prohibitory clause; for we think the amendatory act above recited is broad enough in its provisions to confer the power upon the company, so long as the boat is confined to the legitimate business of the company. We have, moreover, a general statute relating to corporations, approved March 19th, 1845, the first section of which declares that every corporation, as such, has power to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter; and in the second section it is provided that the powers enumerated in the preceding section shall vest in every corporation that shall *hereafter be created*, although they may not be specified in its charter, or in the act under which it shall be incorporated.

The instructions given by the court are unobjectionable. One of them asked by defendants, relating to the measure of damages, declared that the plaintiff could only recover the actual damage sustained by reason of the seizure of the boat.

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But it is contended that the court erred in refusing certain instructions asked by defendants. The first instruction asked and refused, is as follows: "In case the steamboat Dubuque could not have earned any money during the time said boat was in the custody of the sheriff, at the suit of defendants, then the plaintiff can only recover nominal damages in this case."

The court very properly refused this instruction; for whether the boat could or could not have earned anything during the time she was in the custody of the sheriff, was a mere matter of speculation, with which the jury had nothing to do, and which was not susceptible of proof. The following is the second instruction refused: "If the purpose of the plaintiff was to lay up said boat Dubuque during the month of November or December, 1857, the plaintiff cannot recover in this case for the time it was the purpose of said plaintiff to lay up said boat." Upon what principle of law this instruction was asked, we are unable to comprehend. If the plaintiff had determined to lay up the boat for any given period, it could change that determination at any moment, it being a matter resting solely in the discretion and upon the will of the plaintiff. Third instruction refused: "Unless the jury believe from the evidence that the plaintiff has sustained a greater amount of damages by the detention of the steamboat Dubuque than the amount of the note and interest set up by the defendants as a counter-claim, then they will find for the defendants for the amount of said note and interest, less the amount of damages they may find said plaintiff may have sustained."

The refusal of the court to give this instruction did not operate to the prejudice of the defendants, for the jury in their verdict specially found for the defendants the full amount of their counter-claim, and deducted it from the damages which they found the plaintiff had sustained.

Fourth instruction refused: "If the jury find that plaintiff is entitled to recover for the taking and detention of the boat in question, then the measure of damages should be what

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they may find from the evidence would have been the net earnings of the boat after deducting the cost of running her."

The objection to the second instruction applies with equal force to this. The jury will not be permitted to speculate as to what might be the probable or expected profits of a boat. (See *Taylor v. Maguire*, 12 Mo. 313.)

The fifth and sixth instructions refused relate to the ownership of the boat, and have already been disposed of.

The judgment will be affirmed, the other judges concurring.



JOSEPH WALLHORMFECHTEL, Respondent, v. EDWARD DOBYNS, Appellant.

Parties.—Suit is properly brought in the name of the person with whom the contract is made, although the business may have been conducted under an assumed partnership name.

Appeal from St. Louis Law Commissioner's Court.

Lackland, Cline & Jameson, for respondent.

No brief for appellant on file.

BAY, Judge, delivered the opinion of the court.

The only point presented by the record in this case is, whether the suit was brought in the name of the proper party. The testimony shows that plaintiff kept a brickyard, and did business under the name and style of Joseph Williams & Co., though he sometimes did business in his own name. The brick furnished defendant came from plaintiff's yard, and plaintiff in person contracted with defendant.

The court, at the instance of defendant, declared the law as follows:

"If the court, sitting as a jury, believe from the evidence that defendant, Dobyns, contracted with Joseph Iringer, as agent for Joseph Williams & Co., to furnish brick for the erection of a brick building in Webster street, near Thir-

Kleinmann v. Boernstein.

teenth street, and that the brick used were furnished under that contract; and if the court, sitting as a jury, believe further that Wallhormfechtel, the plaintiff, claims the value of said brick so furnished, as original contractor with Dobyns, the defendant, then it must find for the defendant, unless the court believes from the evidence that the said Joseph Williams & Co. and Joseph Wallhormfechtel are identically the same."

Under this instruction, given at the request of defendant, the court had simply to determine whether plaintiff was the identical person represented by the name of Joseph Williams & Co.; and as the proof was conclusive of that fact, the court could not have done otherwise, under defendant's own instruction, than find for the plaintiff.

The defendant's second instruction was properly refused, as there was no evidence of the existence of a partnership. Effinger, the witness relied upon to prove a partnership, stated that he had nothing invested in the yard, but was simply in the employ of plaintiff, receiving as wages forty dollars per month.

The court properly overruled the motion of defendant to dismiss; for if there was a misnomer, the defendant could not take advantage of it in this manner.

Let the judgment be affirmed. The other judges concur.



GOTTFRIED KLEINMANN, Respondent, v. HENRY BOERNSTEIN,
et al., Appellants.

Notice of Protest.—A notice of protest, to bind the endorser of a note, must be left at his usual place of business, and not merely in the building in which he does business.

Witness.—A maker of a promissory note against whom judgment by default has been taken, is a competent witness for an endorser made co-defendant in the same suit.

Appeal from St. Louis Circuit Court.

A. M. & S. H. Gardner, for appellants.

I. Helgenberg was a proper witness. As he had withdrawn

his answer, and default had been entered, his testimony could not benefit himself.

The defence of Boernstein was peculiar to himself, of which Helgenberg could take no advantage. (Page et al. v. Butler et al., 15 Mo. 547; 1 Green. Ev., § 355; Steel v. Boyd, 6 Leigh, 547; 4 Sanf. 616; 3 Smith, 7 N. Y., 507; Acts 1856-7, p. 181.)

II. No proper notice of demand and refusal of payment was delivered to or served upon the endorser. (Sto. on Bills, 300.)

H. N. Hart, for respondent.

I. Helgenberg was not a competent witness for his co-defendant. *a.* Because the matters offered to be proved occurred anterior to the transfer of the note by Helgenberg to the plaintiff. *b.* Because the matter of defence went to the whole suit. (R. C. 1855, p. 1577, § 3 & 6; Acts 1857, p. 181; Benoist v. Donnelly, 26 Mo. 589; Garnier v. Le Beau, 30 Mo. 229; Schaefer v. Kahlman, 30 Mo. 233.)

II. The notice of protest was left at the usual place of business of defendant. (Sto. Prom. Notes, § 312; Sto. on Bills, 297.)

III. The plaintiff was not bound to prove that he gave value for the note; the law presumes that from his possession of it. (Clark v. Schneider, 17 Mo. 295.)

BATES, Judge, delivered the opinion of the court.

This is a suit brought against Helgenberg, the maker, and Boernstein and Reichard, endorsers, of a negotiable promissory note. The suit was afterward dismissed as to Reichard. Helgenberg answered, and afterward withdrew his answer, and the petition was taken against him as confessed. Boernstein answered that his endorsement was obtained by Reichard by false and fraudulent representations, of which the plaintiff had knowledge, etc.; and also denies that he had due notice of the protest of the note.

At the trial of the issues between the plaintiff and Boern-

stein, the notary who made the protest testified that he "demanded payment of the note in question, of the maker, on the day it became due. Payment was refused, and on the same day he gave notice of its non-payment to Boernstein by delivering the notice to him personally, or by leaving it on a desk in his office in his absence. I know the building in which Boernstein keeps his office. The office in which the notice was left is in the second story of the building. I can't state whether I left it on the desk of Boernstein, or gave it to him personally."

Another witness testified that Boernstein's office was in the third story of the building.

Defendant Boernstein then called as a witness the defendant Helgenberg, and offered to prove by him that the note in question was obtained by Reichard by fraud, and without consideration; that plaintiff never paid any consideration for it, and that the plaintiff was a party to Reichard's fraud; and that plaintiff knew, at the time he obtained the note, that Boernstein's endorsement on the same was obtained by fraud and misrepresentation on the part of Reichard; and that he (plaintiff) took said note without consideration, and in collusion with said Reichard, for the purpose of defrauding said Boernstein.

The plaintiff objected to Helgenberg's being sworn as a witness, on the ground that he was a co-defendant, and his evidence would establish no separate defence for Boernstein. The court sustained the objection and excluded the testimony, to which the defendant excepted.

The court gave the following instruction for the plaintiff:

"In assessing the damages against John Helgenberg, and if the jury find for plaintiff against Henry Boernstein, they will assess damages on the sum specified in the said note at the rate of four per cent., which add to the principal, and then interest at the rate of ten per cent. per annum on the said sum from the maturity of the note to this time."

The court refused to give these three instructions moved by the defendant:

1. If the jury find from the evidence that the notice of protest and nonpayment of the note in question was left by the notary on a desk in the second story of the building occupied by defendant Boernstein, and that the business office of said defendant was in the third story of said building, then the jury ought to find a verdict for said defendant Boernstein, unless they further find from the evidence that defendant actually received said notice.

2. Unless the jury find from the evidence that notice of the nonpayment of the note in question was delivered to defendant Boernstein personally, or to some person in his employ, at his usual place of business, within a reasonable time after the same note became due, then they will find for the said defendant Boernstein.

3. The plaintiff is not entitled to recover any damages on the note in question, unless the jury find from the evidence that he purchased the same, or acquired some interest therein for a valuable consideration, and the burden of proof to establish that fact is upon the plaintiff.

The first instruction asked by the defendant should have been given.

A notice is presumed to have been received by the party to whom it is directed when it is left at his usual place of business, but places of business within one house may be as distinct and separate as if they were in separate houses; and to leave a notice in one story of a house, when the party's place of business is in another only, is no proper service of the notice.

The witness Helgenberg should have been sworn, and then the admissibility of the testimony it was proposed he should give would properly come up for consideration.

Judgment reversed and cause remanded. Judges Bay and Dryden concur.

BARNETT ORRICK, Appellant, v. ST. LOUIS PUBLIC SCHOOLS,
Respondents.

Forcible Entry and Detainer.—The action of forcible entry and detainer must be brought against the party in actual possession of the premises at the time of suit brought. (R. C. 1855, p. 1787.)

Appeal from St. Louis Land Court.

Plaintiff brought his action for forcible entry and detainer against the defendants, before a justice of the peace, from whence the case was removed by *certiorari* to the St. Louis Land Court.

The plaintiff claimed that he was in the actual possession of part of lot eighteen, in Robt. N. Moore's addition to the city of St. Louis, having a front of twenty feet on the south side of West Mound street, by seventy-six feet in depth, and that the defendants had forcibly ousted him from his possession of said premises, and forcibly detained the possession.

It appeared on the trial that the defendants had recovered judgment in ejectment against one Elizabeth Holis, for a lot on the south side of West Mound street, of forty-five feet front by seventy-six deep, in school survey No. 379, and that, under an execution upon said judgment, to which plaintiff was in no way a party, the defendants had forcibly ejected the plaintiff from the possession of the premises; and had, before the commencement of this action, leased the same to one Hollingsworth and put him in possession.

W. T. Wood, for appellant.

The brief of this gentleman related to points not touched upon by the court.

Casselberry, for respondents.

I. Hollingsworth, and not the defendants, was the party in possession at the commencement of this suit, and the action should have been against him, and not against the defendants. As the Schools were not in possession, they did not forcibly detain the premises.

DRYDEN, Judge, delivered the opinion of the court.

The party in the actual possession of the premises detained at the time of the institution of an action of forcible entry and detainer is the one liable to the action. In this case, it is manifest the plaintiff was forcibly and wrongfully ousted of his possession by the defendants; yet the evidence shows that before the suit was brought the defendants leased and delivered the exclusive possession of the premises in controversy to one Hollingsworth, who, at the institution of the suit, still held such possession; and he, therefore, and not the defendants, should have been sued. (R. C. 1855, p. 787.) Inasmuch, then, as the judgment is obliged to be for the defendants, it is unnecessary for us to give any opinion as to the errors complained of by the plaintiff.

The other judges concurring, the judgment of the Land Court is affirmed.



JAMES G. HUMAN & Co., Respondents, v. HENRY CUNIFFE & Co., Appellants.

Partnership—Contract.—A partnership contract which would be good without a seal will still be valid as a simple contract, although the partner who executed the instrument had no special authority to put the partnership name to such paper.

Agent.—Where an agent executed a note in the name of his principal, the principal will be bound if the agent had authority to give such note, or the principal afterward ratified his act.

Appeal from St. Louis Circuit Court.

The facts are stated in the opinion of the court.

Casselberry, for appellants.

I. The agreement described in the petition is under seal, and does not bind any one of the firm except the partner signing it. (Henry County v. Gates, 26 Mo. 315.)

II. The agent had no authority to execute the note described in the petition.

III. The fourth instruction is inconsistent with the sixth, given by the court on its own motion, and with the decisions of *Taylor v. Maguire*, 13 Mo. 517, and *Lyon v. Bertram*, 20 How. 149.

Flournoy, for respondents.

I. The act of Musick, the agent, binds his principals. It was ratified by them. (*Stothard v. Aull*, 7 Mo. 318; *Sto. Ag.*, § 66, 67, 50; 2 *Green. Ev.*, § 61.)

II. The instructions given fairly put the case to the jury. (*Stothard v. Aull*, 7 Mo. 318; 2 *Green. Ev.* 61; 1 *Pars. Cont.* 46; 9 *Cranch*, 153; *Cames v. Bleeker*, 12 J. R. 300; *Odiorne v. Maxey*, 13 *Mass.* 178; 2 *Bouv. Ins.* 25.)

BATES, Judge, delivered the opinion of the court.

The plaintiffs were partners in business, as were the defendants. On the 7th of March, 1857, they entered into the following agreement:

"This article of agreement, made and entered into by and between J. G. Human & Co., of Humansville, Mo., of the first part, and Henry J. Cuniffe & Co., of Las Cruces, N. M., of the second part, witnesseth, that said party of the first part agree to furnish the said party of the second part fifty yoke of work oxen, certain, and, probably, one hundred yoke of well broke oxen, to be delivered at Westport, Missouri, on the fifteenth day of April next, to said Cuniffe & Co., or their authorized agent; in consideration of which, said Cuniffe & Co. agree to pay said J. G. Human & Co. seventy-five dollars per yoke, in six months after the day of the delivery of said cattle at Westport, Missouri. None of the cattle are to be younger than four years, nor any of them to be older than eight. They are to be in good working condition when delivered. Furthermore, none of said cattle are to be from Texas or Arkansas; nor are any of them to be lame, blind or deformed, but to be sound when delivered.

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"In witness whereof, we have herewith set our hands and seals this seventh day of March, 1857.

J. G. HUMAN & Co., [L. S.]

Per L. B. HUMAN.

HENRY J. CUNIFFE & Co., [L. S.]

"Witness—M. S. FIFE, CHAS. E. MUSICK."

The defendants afterward requested plaintiffs to furnish an additional number of oxen, not exceeding, in the whole, one hundred and seventeen yoke. The time of delivery was also postponed, because the grass was not sufficiently grown to support cattle. On the 22d day of May, 1857, the plaintiffs did deliver to an agent of the defendants one hundred and nine and a half yoke of oxen. The agent of the defendants gave plaintiffs a note for the price of the cattle so delivered; but his authority to give the note for his principals is questioned. A portion of the price of the oxen was subsequently paid, and this suit is brought for the remainder. The main ground of defence is that the oxen were not of the quality contracted for; and much conflicting testimony is given as to their quality. The defendants set up a counter-claim for their losses occasioned by the inferiority of the oxen. The defendants also set up that they are not bound by the written contract copied above, because it is under seal, and one partner cannot so bind a firm.

As to this point, it is sufficient to say here that it is conceded to be the law, that where a partnership contract would be good without a seal, the addition of a seal will not prevent it enuring as a simple contract, although the partner who executed the instrument had no special authority to put the partnership name to such a paper. (See *Henry County v. Gates*, 26 Mo. 315.)

Conflicting testimony was given as to the authority of Musick, the defendants' agent, to give the note in question, and also to a subsequent ratification of it by the defendants.

The court, at the instance of the plaintiffs, gave these three instructions:

1. If the jury believe from the evidence that Charles E.

Musick was the agent of defendants, and was authorized by them to receive the cattle and settle for them by giving the note in question, and that he did so receive and settle for them, then defendants are liable upon said note in the same manner as if executed by themselves. If the jury believe from the evidence that Charles E. Musick executed the note in question as the agent of the defendants, but without previous authority from them, but that defendants, after they were informed of the fact, ratified, assented to, or acquiesced in the said act of said Musick, then they are liable on said note; and such ratification or assent need not be expressed, but may be implied or inferred from circumstances which the law considers equivalent to an express ratification. If the jury believe from the evidence that Charles E. Musick executed the note in question without previous authority from defendants, and that the execution of said note was never subsequently ratified, assented to, or acquiesced in by defendants, but that defendants, by their agent, did purchase and receive cattle from plaintiffs under a special contract, then they are liable to plaintiffs for the value of said cattle so received at the contract price, if said cattle complied with the terms of said contract; and if not, defendants are still liable for the cattle so received at what they were reasonably worth at the time when, and place where, they were received by defendants or their agent.

2. If the jury believe that defendants, by their agent, had an opportunity and did examine the cattle before they received them, and saw their defects, if any they had, and that they could have rejected such as did not comply with the terms of said contract, and defendants, by their agent, received the cattle as coming up to the requirements of said contract, then they cannot now object to defects of which they were aware at the time they received them, and have no right to set up such defects as a defence to a suit for the price of said cattle.

3. If the jury believe from the evidence that, after the note in question was executed by said Musick as the agent of de-

fendants, but without previous authority from them, and that defendants were afterwards informed of the facts, and made no objection to the act of their said agent in drawing said note, and that afterwards defendants made payments to plaintiffs, or accepted and paid drafts drawn by them on account of said note, these facts are evidence tending to show that defendants acquiesced in the act of their agent in drawing said note; and if they believe from the evidence that defendants did so adopt, assent to, ratify, or acquiesce in, said Musick's executing said note after they were informed of the fact, then they are liable on the note.

The court also, on its own motion, gave this instruction:

"If you find plaintiffs failed to deliver such cattle as were contracted for, and at the time contracted for, and such condition of the contract were not waived, and that the cattle were not received by Musick, acting as the agent of defendants, as coming up to the requirements of such contract, then defendants are entitled to recover on their counter-claim, and direct or approximate damages arising therefrom."

The court also gave, on motion of the defendant, this instruction:

"The acceptance of the cattle by defendants, through Charles E. Musick, is no waiver by defendants of any claim they may have had upon the plaintiffs for breach of the contract under which said cattle were delivered by them."

The court refused the following instructions, asked by defendants:

1. If the jury believe from the evidence that the oxen delivered by the plaintiffs to the defendants were not well broken, and were not, in all other respects, of the quality, kind and description specified in the counter-claim set up in the answer of the defendants, the plaintiffs can only recover whatever the jury believe from the evidence that said oxen were reasonably worth at the time of said delivery, after making such deductions as are alluded to in other instructions given with the instruction. If the jury believe from the evidence that there was sufficient grass on the plains on

which to subsist teams in travelling over the same after the time agreed on by the parties for the delivery of the oxen, and before the time they were really delivered, the defendants are entitled to whatever expenses, loss or damages they may have met in such delivery, by reason of the delay in such delivery. If the jury believe from the evidence that the defendants suffered expense, loss or damage in not arriving in the Territory of New Mexico with their goods as soon as they could have arrived if the plaintiffs had furnished oxen according to the contract mentioned in the counter-claim, they, the said defendants, are entitled to the amount of such expense, loss or damage.

2. If the jury believe from the evidence that the defendants suffered any expense, loss or damage, by reason of the plaintiffs not furnishing well broke oxen, according to the contract mentioned in the counter-claim, the defendants are entitled to the amount of such expenses, loss or damage.

3. The note given in evidence by the plaintiffs does not bind the defendants, unless the jury shall find from the evidence that Charles E. Musick was authorized by the defendants to execute the same; and the burden of showing that said Musick was so authorized at the time to execute the same rests upon the plaintiffs.

4. If the contract upon which the cattle were delivered required them to be delivered to defendants on the 15th day of April, 1857, the fact that the grass was not sufficiently grown to support the cattle up to that date is no excuse to the plaintiffs for their failure to deliver them by that day, unless defendants dispensed with the delivery on that day.

5. And if the defendants waive the delivery on said 15th day of April, then the plaintiffs were bound to deliver the cattle in accordance with such waiver.

6. And if plaintiffs fail to deliver the cattle according to the terms of such contract and waiver, then the jury ought to allow to defendants against the claims of plaintiffs for all expenditures defendants may have been subject to by reason of such failure.

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7. If the cattle delivered by plaintiffs to defendants were delivered under the contract delivered in evidence by the plaintiffs, and if said cattle were not well broken, or were less than four or more than eight years old, or not in good working condition, or were lame, or blind, or deformed, or unsound, or from Arkansas or Texas, then the jury ought to allow to defendants against the claim of plaintiffs all expenses, losses and damages sustained by defendants by reason thereof.

The counsel for the appellants have elaborately argued the instructions given and refused, but we think it unnecessary to go over them in detail. Those given put the case before the jury fairly and legally, and also include the same matters contained in those asked by the defendants and refused.

That part of the third instruction, given on motion of the plaintiffs, under certain circumstances to recover the reasonable value of the cattle, is not approved, because it is not so claimed in the petition. The jury did not, however, find upon that ground; and the defendants cannot complain of it, for they adopted the same view and asked an instruction of similar effect.

Judgment affirmed.

ASA N. OVERALL, ADMINISTRATOR OF MARY PAYNE, Plaintiff
in Error, v. VESPASIAN ELLIS *et al.*, Defendants in Error.

Note.—When a holder of a note secured by mortgage had prior to his bankruptcy endorsed the note to third parties as collateral security for the performance of conditions, and the endorsees subsequent to the bankruptcy transferred the notes without endorsement to the plaintiff's intestate; *held*, that the plaintiff, having the legal title, had the right to enforce collection of the note and the foreclosure of the mortgage, and that the liability of the plaintiff to account to the assignee in bankruptcy did not affect the right of the plaintiff.

Error to St. Louis Land Court.

Plaintiff filed his petition the 14th December, 1855, in the St. Louis Land Court, to foreclose a mortgage upon certain

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lands in St. Louis township, made by Vespasian Ellis in January, 1839, to secure, among other notes, three notes of five hundred and odd dollars each. The notes and mortgage were executed to John Riggin, mortgagee, who endorsed the said three notes before maturity to Thomas J. Payne for value.

In 1840, before the maturity of said three notes, Thomas J. Payne endorsed and delivered the said notes to Spalding and Tiffany, to be held by them as collateral security against certain encumbrances on other lots of ground sold by Payne to Spalding and Tiffany.

The following is the receipt and agreement: "Received of Thomas J. Payne three notes, made by Vespasian Ellis, payable to John Riggin, and by him endorsed, and also by said Payne, dated May 1st, 1839, and payable, the first in six years, for five hundred and ninety-five $\frac{20}{100}$ dollars; the second in seven years, for five hundred and fifty-six $\frac{80}{100}$ dollars; the third for five hundred and eighteen $\frac{40}{100}$ dollars, in eight years, from the respective dates of said notes; which notes it is hereby agreed shall be held on the following condition," &c. (See condition given in the opinion.)

In August, 1842, Thomas J. Payne petitioned for the benefit of the bankrupt law, and was declared a bankrupt in December, 1842.

In July, 1846, one Mary Jones, a widow, claiming to have a title paramount to said lot of thirty feet front on Main street, and also to certain other property of Spalding and Tiffany, compromised and arranged the conflicting title with Spalding and Tiffany, by making them a deed, on the 25th of July, 1846, (Rec. 41) for the said thirty feet of ground on Main street, on condition that said Spalding and Tiffany would give the said three notes for the said deed and property thereby conveyed by her, said Mary Jones, to them.

In November, 1846, Payne and Mary Jones intermarried, and a full marriage contract was executed between them, providing that all the property, real and personal, *choses in action*, and goods and chattels of the said Mary Jones, would

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continue to be hers, free from all control or debts of her intended husband. Upon the execution of this contract, the marriage of the parties was solemnized.

Mrs. Mary Jones Payne died in 1853, and the plaintiff has been duly appointed her administrator, and brought this suit to foreclose the said mortgage for the payment of the said three notes.

The plaintiff asked the following instructions :

1. That the marriage contract secured to Mrs. Payne her separate interest in the property.

2. That if the notes in question were transferred and delivered by Payne to Spalding and Tiffany, in 1839 or 1840, nothing more was necessary, so far as Payne was concerned, to pass to them his title to the notes.

3. That there is no evidence in this case of any cancellation, payment or satisfaction of the note in question.

4. That if Mary Jones, prior to her marriage with Payne, or afterwards, conveyed to Spalding and Tiffany her interest in a lot of ground in St. Louis, and in consideration thereof Spalding and Tiffany delivered over the notes to Payne for her use, nothing more was required to put the title of said notes in her.

5. That it can constitute no defence to this action, even should it appear that the notes were fraudulently transferred to Mary Payne (Jones) through the agency of Thomas J. Payne.

6. That in 1842, when Payne applied for the benefit of the bankrupt act, the notes in question belonged to Spalding and Tiffany, then the assignee of Payne in bankruptcy acquired no title to them.

7. That no property acquired by Thomas J. Payne, after his application in bankruptcy, would pass by virtue of said law to said Payne's assignee in bankruptcy.

Of the above instructions the court gave the first, second and fourth, and the others were refused.

The defendants asked the following instructions, which were given by the court :

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1. If the jury find from the evidence that Mary Payne was not the owner of the notes in question at the time of her death, they should find the first issue for the defendants.

(The second instruction appears in the opinion.)

3. That if the jury believe from the evidence that any witness has wilfully testified falsely in respect to any material fact, they are at liberty wholly to disregard the testimony of said witness.

The plaintiff excepted to the second instruction given for defendants, and to the refusal of the court to give those asked by the plaintiff, plaintiff submitted to non-suit with leave to move to set the same aside.

Hill & Jewett, for plaintiff in error.

1. The notes were endorsed in blank by Riggin, and passed by delivery. The possession, therefore, was sufficient evidence upon which to maintain this suit, an action at law. (*Odell et al. v. Presbury*, 13 Mo. 330; *Webb v. Morgan et al.*, 14 Mo. 428; *Bennett v. Toney*, 28 Mo. 598; *Boeha v. Nuel*, 28 Mo. 180.)

2. The defendants set up no equitable defence to this suit to foreclose the mortgage. The assignee in bankruptcy took no title to the notes. The most he could have had would have been a right to redeem by complying with the conditions of the agreement between Payne and Spalding and Tiffany.

Krum, for defendants in error.

1. There was no final judgment in the court below from which the plaintiff could appeal.

2. Plaintiff's intestate was not the legal holder of the notes in question. They really belonged to the assignee of Payne in bankruptcy.

BATES, Judge, delivered the opinion of the court.

This is a suit brought to foreclose a mortgage of real estate against the mortgagor, the vendee of the mortgaged land and the terre tenant.

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The petition states that the notes upon which the suit is founded, which were a part of those secured by the mortgage, were made by Vespasian Ellis, payable to John Riggin, by him endorsed to Thomas J. Payne, and by him to Spalding and Tiffany, and that the plaintiff's intestate, Mary Payne, (who was then a *femme sole* with the name of Mary Jones,) purchased the notes, for value, from Spalding and Tiffany. Mary Jones afterward intermarried with Thomas J. Payne.

The answer sets up that the notes have been paid and the mortgage discharged. It also denies that the plaintiff's intestate ever acquired any right to said notes.

The court directed two issues to be tried by a jury, as follows:

First—Whether Mary Payne, the plaintiff's intestate, was the owner of the notes in question or either of them at the time of her death.

Second—Whether the notes in question or either of them were fully paid, or otherwise satisfied or cancelled, before the death of Mary Payne, the plaintiff's intestate.

At the trial of these issues, after the evidence was all given, the court instructed the jury that there was no evidence of any cancellation or payment, or satisfaction of the notes in question.

That instruction disposed of the second issue in favor of the plaintiff.

The court also instructed the jury, that if they find from the evidence that Thomas J. Payne, in November, 1840, was the holder of the notes in question; if he entered into the agreement or arrangement in respect to said notes set out in the writing read in evidence, purporting to be signed by Spalding and Tiffany and Payne; if said Payne, at the time said agreement or arrangement was made, endorsed and delivered the notes in question to said Spalding and Tiffany; if said Payne, in December, 1842, was decreed a bankrupt in the District Court of the United States for the District of Missouri upon his petition filed in said court for that purpose; if, at the time said Payne was decreed a bankrupt in

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said court, the said Spalding and Tiffany still held said notes under and in pursuance of said agreement or arrangement mentioned in said writings, then the right to the notes in question, after Spalding and Tiffany's right to hold them ceased, was vested in the assignee of said Payne in bankruptcy, and the jury should find the first issue for the defendant.

The writing signed by Spalding and Tiffany and Payne, referred to in that instruction, declared that said notes should be held by Spalding and Tiffany "on the following condition : Whereas, Thomas J. Payne heretofore conveyed unto Josiah Spalding and P. Dexter Tiffany, a certain lot of ground in Central St. Louis," (describing it.) "Now, if said Payne shall free said lot from the encumbrance and lien of a certain mortgage made by said Payne to Peter Morton, president of the Clinton Bank, or to some one for the benefit of said Clinton Bank, New York, and from the liens and encumbrances of all the judgments which were rendered against said Payne previous to the recording of said deed from Payne to Spalding and Tiffany, then they, the said Spalding and Tiffany, shall account for said notes ; but if the said encumbrances shall remain and the said Spalding and Tiffany shall be ejected or evicted from said lot, then they, the said Spalding and Tiffany, shall retain out of said notes the consideration money paid by said Spalding and Tiffany to said Payne for said lot, and interest on the amount of said consideration money from the time the same was paid to said Payne, as appears by the date of said deed."

This agreement vested in Spalding and Tiffany the legal title to said notes, (as the court in another instruction properly informed the jury,) and Payne or his assignee in bankruptcy retained only a right in a certain contingency to require of Spalding and Tiffany an account of said notes, or their proceeds, if collected. Spalding and Tiffany could assign the notes to another person, and their assignee would have good title to them, and right to enforce collection of them. Whether such assignee would be liable to account to Payne

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or his assignee in bankruptcy for the proceeds of the notes, does not arise in this case. Nor does it appear in this case that the contingency has happened upon which Spalding and Tiffany might be called to an account.

The instruction given was therefore erroneous in directing the jury to find the first issue for the defendant, if they found the facts as recited in the instruction.

The respondent also contends that the appellant was not compelled by the giving of that instruction to take a non-suit, and therefore his appeal should be dismissed.

We are disposed to discourage the taking of non-suits as tending to protract litigation, but we think that in this case the instruction given so covered the case as absolutely to prevent a recovery by the plaintiff, and he was therefore justified in taking a non-suit.

If the first issue had been found against the plaintiff, obviously he could proceed no further, and the evidence as preserved in the bill of exceptions forbids that under the instructions given there could be any other finding than for the defendant.

Judgment reversed and cause remanded. Judges Bay and Dryden concur.

WM. FARRELL'S ADMINISTRATOR, Appellant, v. JAMES BRENNAN'S ADMINISTRATRIX, Respondent.

Practice.—An error of the court in refusing to a party the opening and conclusion of a case to the jury, furnishes no ground for a new trial, unless the party has been materially injured thereby.

Evidence.—Evidence of the contents of letters cannot be given until their absence is accounted for, and the inability to produce them shown.

Evidence—Sanity of Testator.—Witnesses acquainted with testator may state their opinions as to his sanity, but should not be asked "if they thought his mind sound enough to make a will," as that would involve a question of law for the court to determine, and not the witness.

Appeal from St. Louis Circuit Court.

The facts are sufficiently stated in the opinion.

A. J. P. Garesché, for appellant.

I. The court should have permitted the witnesses to be asked their opinion as to the sanity of the testator, where they testified to facts of their own observation, or from long acquaintance with the testator. (1 Greenl. on Ev., p. 573, note 5 to § 440, 2d ed.)

The opinion of witnesses that testator, from defect of understanding, was incompetent to make a will, having been excluded by the court at *nisi prius*, held, by the Supreme Court of Pennsylvania, "that there was no plausible reason to sustain the objection. How, otherwise, could the alleged imbecility of mind be proved than by the evidence of those who grew up with him, who marked his conduct in infancy, in the prime of life, and in his decline? The opinion of the witness, without stating the ground of such opinion, ought not to be received. But where they state facts indicative of a want of common intellect, their opinion is always received. The weight it ought to have will depend upon the solidity of the reasons assigned for the opinion, and the intelligence of the witness." For this exclusion the cause was reversed. (Rambler v. Tryon, 7 Serg. & Rawle, 92; Benton v. Scott, 3 Rand., 403-405; Kenworthy v. Williams, 5 Ind. 379; Kinne v. Kinne, 9 Conn. 102; Potts v. House, 6 Geo. 336-344; Dicken v. Johnson, 7 Geo. 486; Brook et al. v. Townshend, 7 Gill. 27; reaffirmed in Stewart v. Reddil, 3 Md. 78; Roberts v. Trawick, 13 Ala. 85.)

In New York the doctrine is laid down as asked by the appellants. In Culver v. Haslam, 7 Barb. S. C. Rep., p. 321. This case was by a majority of the court (Judge Denio dissenting) reversed, and the opinion of witnesses excluded. (See DeWitt v. Barley, 9 N. Y., 5 Sel., 374.) Subsequently the cause of DeWitt v. Barley went again to the Court of Appeals, and the question finally decided by the adoption of the dissenting opinion of Judge Denio as given upon the first appeal. (DeWitt v. Barley, 17 N. Y., 3 Smith, 340; Flores v. Flores, 24 Ala. 247; McDaniels v. Crosby,

19 Ark. 546; 12 Ohio, Stanton's Rep., 492, Clark v. The State, and the English cases therein cited; Judge Gaston's opinion in Clary v. Clary, 2 Iredell, 84, and for which cause the case was reversed.)

In Missouri the question may be said to be decided. (Baldwin v. The State, 12 Mo. 237.) For though this be a criminal case, it is founded upon the will case of Clary v. Clary, above cited.

II. The opening or closing of the evidence in a case does not belong either to the plaintiff or defendant as such, but to the party on whom rests the affirmative of the issues. (Goss v. Turner, 21 Vt. 437.) Greenl. Ev., § 74, p. 99, ed. 1854: "Whereby the pleadings, the burden of proof of any matter in issue is thrown upon the plaintiff, he must in the first instance introduce all the evidence upon which he relies to establish his claim. He cannot, as said by Lord Ellenborough, go into half of his case and reserve the remainder," (Hathaway v. Hemmingway, 20 Conn. 195,) and particularly the case therein cited of Rex v. Beasley, 4 Carrington & Payne, 220.)

The statute (see 300 R. C. 1855, p. 1571) requiring that the petition to contest a will should be by one interested, the allegation by plaintiffs of their heirship of testator, denied by defendants, was a material allegation, and of itself entitled them to open and close the case.

If the record contains several issues, and the plaintiff holds the affirmative in any of them, he is entitled to begin. (Greenl., ed. 1854, p. 100, § 74; Jackson et al. v. Pittsford, 8 Blackford, 195.)

a. The test to determine the order of beginning at a trial is to consider "which party would be entitled to the verdict, supposing no evidence given on either side, as the burden of proof must be on the adversary. (Leete v. Gresham Ins. Co., 7 Eng. Law and Equity, 578; 1 Foster, N. H. 181; Belknap v. Wendall, 6 Pick., 226; Ayer v. Austin, 37 N. H. 236; Chesley v. Chesley, Wells v. Pike, and Colt v. Beaumont, decided at this term.)

b. That sanity of testator is presumed, and that the burden of proof of imbecility lays upon the plaintiff. (2 Starkie, 929; 2 Greenl. 672, § 689, ed. 1854; Dayton on Surrogate, 51; Wheeler v. Anderson, 3 Haggard's Eq. R. 598; Sloan v. Maxwell, 2 Green's Chy. R. 581; Jackson v. Vanderson, 5 John. 158; Ford v. Ford, 17 Humphrey's Tenn. 99; Grabill v. Barr, 5 Penn. 441; Landis v. Landis, 1 Grant Cases, 250; Pettes v. Bingham, 10 N. H. 515; McDaniels v. Crosby et al., 19 Ark. 545; Dend Trumbull et al. v. Gibbons, 2 Zabriskie, 155; Saxon et al. v. Whitaker, 30 Ala. 238; Stevens v. Vancleve, 4 Wash. Cir. Ct. R. 269; Brown and wife v. Sovies, 24 Barb. Sup. Ct. R. 583; Copeland v. Copeland, 32 Ala. 512.)

Where the factum of the will is admitted, the plaintiffs have the opening and close of the case.

Adverse 1 Greenl., ed. 1854, 104, § 77; the decisions referred to in this text are taken from Maine, Massachusetts or Connecticut reports. But in these States the courts, when there is a question of probate, do not presume the sanity of the testator, but require it (like any other of the four statutory conditions for the validity of a will) to be proven. (2 Gray's Mass. Rep.; Crownenshield v. Crownenshield, 524; Gernets v. Nason, 22 Me. 441; Cilley v. Cilley, 34 Me. 163; Knox's Appeal, 26 Conn. 22; Hylton v. Hylton, 1 Grat. 165; Rogers et al. v. Thomas, 1 B. Monroe, 390; Hawkins et al. v. Grimes, 13 B. Monroe, 270.)

c. This right of closing is not important where the presiding judge cautiously sums up the evidence. But the privilege is more important where the court is a mere silent spectator of forms, without the right of charging the jury. (6 Pickering, Ayers v. Austin, 226, quoted as authoritative in Searcy v. Dearborn, 19 N. H. 335; Carico v. Kirby, 3 Cranch, Ct. Ct., 594.)

In Cravens v. Falconer, 28 Mo., the issue was the signature of the will, and of course executor or proponents of will should open and close. Wells v. Pike, and Colt v. Beaumont, decided this term, do not conflict.

R. M. Field, for respondents.

This was a proceeding in St. Louis Circuit Court, under the statute of wills, instituted by the heir of Michael Farrel to contest the probate of the will of the latter, which had been allowed in common form in the Probate Court.

In the Circuit Court the statutory issue was tried before a jury. On the trial two exceptions were saved by the appellant:

1. That the respondents representing the party propounding the will were allowed by the court the opening and closing of the testimony and argument.

2. That the respondents, after adducing evidence in the opening to prove the formal execution of the will, were allowed in reply, after the appellant's testimony was given, to put in testimony of the capacity of the testator.

For the respondent it is insisted, that the course adopted by the court below was strictly conformable to the established rules of practice. (*Cravens v. Falconer*, 28 Mo. 19.)

That the matters of exception go only to the form of procedure, which is in the discretion of the trial court; and where no injustice appears to have been suffered by the party, they furnish no ground for reversal in this court.

BAY, Judge, delivered the opinion of the court.

Plaintiff filed his petition in the St. Louis Circuit Court, under our statute of wills, to contest the validity of an instrument of writing purporting to be the last will of Michael Farrel, deceased. The petition alleges that at the time of the execution of the said supposed last will and testament the said Michael Farrell was not of sound and disposing mind, and by reason thereof incapable of making a will. This is the only issue presented by the pleadings in the cause.

The trial was by jury, and a large amount of evidence was given relating to the condition of the testator's mind. The court gave several instructions, and refused several asked by plaintiff, but as no point was made with reference to them, we proceed to notice the grounds relied upon by plaintiff for a reversal of the judgment.

1. It is insisted that the court erred in allowing the defendant the opening and closing of the testimony and argument.

This point was made in *Cravens v. Falconer*, 28 Mo. 19. That was a proceeding under our statute to contest the validity of a will, and Judge Richardson, in delivering the opinion of the court, contended that the *onus* was upon the defendant, and consequently that he had a right to open and close the case. However important it may be to observe uniformity upon all questions of practice, yet we are not satisfied with the rule laid down in that case. The authority cited in support of it is 1 Greenl. Ev. 77; but the rule as there laid down is in reference to the *probate of a will*, and the authorities cited in Greenleaf all relate to the *probate of a will*, in which an appeal was taken from the Probate Court, and a trial *de novo* had. In such cases the *onus* must be upon the party seeking to have the will probated, and he should have the right to open and conclude the case; but this is a statutory proceeding to contest the validity of the will upon the ground of incapacity in the testator, and can be only instituted after the will has been probated. The petition admits the formal execution of the will, and that it has been in due form admitted to probate, but seeks to set it aside upon the ground above stated. The *onus* therefore must be upon the party attacking the will. But as this is a question of practice, an error of the court relating thereto furnishes no ground for a new trial, nor will we disturb the verdict on that account, unless satisfied that the party has been materially prejudiced thereby.

The next point made by the appellant is that the court erred in excluding from the jury a part of the deposition of one John Roddy, in which the deponent undertook to state the contents of certain letters, addressed by Michael Farrell, in his life-time, to his father in Ireland.

There was no proof in the case accounting for the absence of the letters, nor any evidence to show that plaintiff had made any effort to produce them; the deposition was, therefore, clearly inadmissible.

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The third ground assigned for error is that the court refused to permit plaintiff to put a question to the witnesses in the following form :

“From your knowledge of him, would you think his mind sound enough to make a will?”

The question is objectionable as tending to elicit from the witness his opinion as to the *quantum* of intelligence, or mental capacity, that is necessary to enable a party to make a legal disposition of his estate. In other words, it involves a question of law for the court to determine, and not the witness.

Witnesses who have had opportunities for knowing and observing the conversation, conduct and manners of the person whose sanity is in question, may depose not only to particular facts, but to their opinions or belief as to the sanity of the party, formed from actual observation. (See 1 Jarman on Wills, 75.)

The appellant in this case seems to have concluded, that, in sustaining the objection to the question in the form propounded, the court intended to hold that opinions of witnesses upon the question of the testator's sanity were inadmissible; but it is very evident that such was not the ruling of the court, for nine tenths of the record are taken up with the opinions of witnesses on both sides, and the reasons for such opinions. All of which the jury had in evidence before them.

The other judges concurring, the judgment will be affirmed.



JACOB HAUSER, Respondent, v. CHARLES H. HOFFMAN, Appellant.

Mechanic's Lien—Title.—Parties interested in property subject to a mechanic's lien, who are not made parties to the suit to enforce the lien, may, in a suit upon the title under the lien, object to the regularity of the proceedings.

Mechanics' Liens—Limitation.—The act of February 14, 1857, relating to mechanics' liens in St. Louis county (Acts 1856-7, p. 668), requiring suits upon

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liens to be commenced within ninety days after the filing of the lien, applied to liens previously filed under the law of 1855 (R. C. 1855, p. 1064), so as to require suits to be commenced within ninety days after the passage of that act. The plaintiff not having sued upon the lien within ninety days, acquired no title, under the sheriff's sale, upon the lien and judgment, as against parties interested in the land, not parties to the suit to enforce the lien.

Appeal from St. Louis Land Court.

The facts are stated in the opinion. The following instructions were given and refused.

Asked by plaintiff and refused :

1. If the court finds from the evidence that the suit instituted by Christian Faller to enforce his lien, the record of which has been given in evidence, was begun more than ninety days after the filing of said lien, then the judgment and execution in favor of said Faller, and sheriff's deed to the defendant, read in evidence by him, constitute no bar to the plaintiff's right to recover in this action.

2. If the court find from the evidence that the lots of land described in the plaintiff's petition are a part of the Martin Coons' tract, and are within the outboundary lines of survey 2499, read in evidence; if the judgments, execution deeds and writings, read in evidence by the plaintiffs, are genuine; if the defendant, Charles Hoffman, was in possession of said lots when this suit was begun,—then the plaintiff is entitled to recover in this action against said Hoffman.

3. The return of the sheriff upon the execution in the case of Christian Faller v. August William Weber, read in evidence, does not show that said Weber had not sufficient property, other than that described in said execution, to satisfy the same; nor is there any evidence in this case tending to show that said Weber had not sufficient property to satisfy said execution, other than that described therein; and unless the court is satisfied from the evidence that said Weber had not property sufficient to satisfy said execution, other than that described therein, while the said execution was in the hands of the sheriff, and before the sale thereunder, then

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the said sale of the lots in question, and sheriff's deed read in evidence by defendant, constitute no bar to plaintiff's right to recover in this action.

Given for defendant:

If Christian Faller performed work and labor, and furnished materials in the erection and construction of the building and fencing on the lot described in the plaintiff's petition, at the request of August William Weber, commencing February 18th, 1856, and ending October 15th, 1856; that said Weber was the owner, and in possession of said premises; that the building was commenced in February, 1856; that said Faller filed in the clerk's office of said Land Court a lien against the said premises for said work and materials, on the 18th of November, 1856; that on the 14th of July, 1857, said Faller commenced suit in said court to enforce said lien against said Weber and said premises; that judgment was rendered in said suit against said Weber and said premises; that execution was issued upon the said judgment; that the sheriff of St. Louis county advertised and sold said premises, in pursuance of said execution, to said Charles Hoffman, and executed to him the deed read in evidence by the defendant,—then the title of said Hoffman is a better title than the said plaintiff acquired under deed of trust given by said Weber subsequent to the commencement of said building upon said lot, and the plaintiff is not entitled to recover.

Krum & Harding, for appellant.

At the time Faller began to furnish the work and materials for the building (February, 1856), the act of February 24, 1843, was in force, and continued in force until the passage of the act of December 11, 1855. (R. C. 1855, p. 1071, § 25.) This section repeals the act of 1843, but saves the rights of parties acquired under it. (Acts 1843, p. 83; R. C. 1845, p. 699, § 22; R. C. 1855, p. 1027, § 23, and p. 1071, § 25.)

The provisions of the act of 1843 were re-enacted, substantially, February 14, 1857, which required suits to be begun

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within ninety days, and took effect from its passage, and repealed all acts inconsistent therewith. (Acts 1857, p. 668.)

I. The appellant was not a party to the suit of Faller v. Weber, nor had he notice of the lien; therefore, the affidavit of Faller, filed in the Land Court, was erroneously admitted in evidence.

The burden rested upon Hoffman to prove the lien upon the property. The account and affidavit were offered, not to prove the filing of the lien, but to prove the lien itself.

II. The suit of Faller to enforce his lien was not begun within the time prescribed by the statute.

The act of February 14, 1857, repealed the act of 1855, and required suits to be commenced within ninety days. It went into effect from its passage; therefore Faller had ninety days from the date of the passage of that act (Feb. 14, '57) to commence his suit to enforce his lien.

The mode and time of suing belong to the remedy, and the act of 1857 does not take away, abridge, or in any way affect the rights of Faller. (Lee v. Chambers, 13 Mo. 238; Clark v. Brown, 25 Mo. 550; Doelner v. Rogers, 16 Mo. 340.)

III. The eighteenth section of the act of 1855, and the thirteenth section of the act of 1857, are to the same effect—that the judgment for the plaintiff shall be against the debtor as in ordinary cases; with the addition, that if no sufficient property of the debtor can be found to satisfy such judgment and costs, then the residue shall be levied, etc. But the judgment does not conform to the statute.

The return upon the execution does not show how the execution was satisfied—whether by voluntary payment, or by levy upon personal property.

Hauser stands in a position which gives him the right to make every objection to the regularity of the proceedings.

IV. The plaintiff showed a legal title to the premises better than the title of defendant, and the second instruction asked by plaintiff should have been given.

Lackland, Cline & Jameson, for respondent.

I. The record and proceedings of the lien and suit of *Faller v. Weber* were properly admitted in evidence. (R. C. 1855, p. 1067, § 8; 19 Mo. 334.)

II. The mechanic's lien took preference over all claims accruing after the commencement of the building. (R. C. 1855, p. 1067, § 8; *Dubois v. Wilson*, 21 Mo. 213.)

The mechanic was not bound to file his lien against one who was not owner when the building was commenced. (*Jones v. Shawden*, 4 Watts & S. 257.)

III. The mechanic had nine months, after filing his lien, to bring suit. (R. C. 1855, p. 1070, § 20.) The local act of St. Louis county, of February 24, 1843, was repealed by 25th section of R. C. 1855, p. 1071.

IV. The plaintiff's third instruction was rightly refused. It did not apply to the case. The section of the statute under which the execution issued only applies to cases where the contractor is not the owner of the premises. (R. C. 1855, p. 1070, § 18 & 19.)

The omission of the sheriff to make a proper return will not affect the title of a *bona fide* purchaser. (*Draper v. Brysen*, 17 Mo. 71; *Cornelius v. Grant*, 8 Mo. 59.)

BATES, Judge, delivered the opinion of the court.

This is an action for possession of a lot of ground in St. Louis, brought originally against both *Weber* and *Hoffman*, but dismissed as to *Weber* before trial.

At the trial, judgment was rendered in favor of the defendant, *Hoffman*.

Both parties claim title under *Weber*, who, on the first of January, 1856, had good title to the lot.

The plaintiff claims under a deed of trust made by *Weber* on the 9th of July, 1856, to secure the payment of a debt and a sale under the deed of trust, at which sale the plaintiff became purchaser. The defendant claims under a judgment and execution sale at which he was purchaser.

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The questions which are to be considered in the case arise upon objections by the plaintiff to the defendant's title. The judgment under which the defendant claims was upon and for the enforcement of a mechanic's lien. The lien was filed November 18, 1856, and showed an account for work done and materials finished, beginning on the 18th of February, 1856, and continuing down to the 15th October, 1856. Suit was brought to enforce the lien, on the 14th day of July, 1857, against Weber, who made no defence, and final judgment was, on the 10th day of February, 1858, rendered against the defendant, Weber, for one thousand five hundred and fifty-four dollars and seventy-seven cents; and if no sufficient property of said defendant could be found to satisfy said damages and costs, then the residue thereof to be levied out of the said property charged with the lien." Execution was issued, a sale and deed made to the defendant, and a sheriff's return made upon the execution in these words: "Satisfied. March 27, 1858.—James Castello, Sheriff."

When the account filed as a lien begun—that is, February 18, 1856—the special lien law, applicable to St. Louis county, approved February 24, 1843, was in force, and continued so until May 1, 1856, when it was repealed by the 25th section of the general lien law, which went into force on that day by virtue of the 18th section of the act concerning laws. (2d Rev. Laws, 1026.) The act of February 14, 1857 (which took effect on that day), specially applicable to St. Louis county, repealed all acts and parts of acts contrary to or inconsistent with its provisions. (Laws of 1856–7, p. 668.) The act of 1843 and the act of 1857 each required that the suit should be brought in ninety days after the filing of the lien. The act of 1855, which took effect May 1, 1856, gave nine months within which to commence suit in the case of original contractors, as was this case.

In this case the suit was brought within nine months after the lien was filed, but more than ninety days after the lien was filed, and more than that time after the act of 1857 was passed.

1. Neither the plaintiff nor the trustees, or the *cestui que trust* in the deed of trust under which he claims, was a party to the suit on the lien under which the defendant claims, and he may therefore now object to the regularity of that proceeding.

2. The important question in the case is, whether the suit to enforce the lien should have been brought within ninety days after the lien was filed, or whether nine months were allowed after the filing of the lien within which to bring the suit.

The right of action of the plaintiff in the lien suit accrued immediately upon the filing of his lien, and no subsequent legislation could deprive him of that right; but the legislature might alter the mode of enforcing that right, and, as a part of that power, might limit the time within which a remedy would be given him to enforce his right. The law never denies a right, but in all acts of limitation does, under certain conditions and in certain circumstances, deny the remedy. In this case, after the plaintiff's right of action to enforce his lien accrued, the legislature enacted that all such suits should be brought within ninety days after the filing of the lien. This enactment could have no retrospective action, and, consequently, where liens had already been filed, the persons filing them would still have ninety days within which to bring their suits; and if the plaintiff in the case now being considered had brought his suit in ninety days from the passage of the law, his suit would have been in time; but as he did not do so, he has lost all advantage of his lien; and not having proceeded according to the law, the proceedings are, as to the plaintiff in this suit, a nullity.

The court below having taken an opposite view of the question, and instructed the jury in accordance with that view, its judgment is reversed and the cause remanded for a new trial.

Judges Bay and Dryden concur.

JOHN BERNARD, Respondent, v. FREDERIK LÜPPING *et al.*,
Appellants.

Sunday—Contract.—No damages can be recovered for a breach of contract for unnecessary labor to be done on Sunday, such as playing music at a beer-garden. (R. C. 630, § 33.)

Appeal from St. Louis Law Commissioner's Court.

The testimony in this case shows such an utter confusion of ideas, as to matters sacred and profane, as to become really amusing; and for this reason we submit it in full, for permanent preservation.

The plaintiff called as a witness John F. Lubbering, who testified as follows:

"I know the parties to this suit. The defendants kept Hyde Park during the spring of 1859; I was engaged there from the first of May to the last of July. Hyde Park was doing business like all the other parks; it had amusements, and all kinds of refreshments, and sacred concerts, on Sundays. There was no dancing; the music was sacred, and not to be danced by. I know the plaintiff, Bernard; he was employed at Hyde Park the latter part of May, or first of June, with his band. The defendants authorized me to employ them; defendant Lüpping approved my act of employing them. I employed the plaintiff to play with his band, for the season, at fifty dollars a Sunday, pleasant weather, and twenty-five dollars a Sunday in unpleasant weather. I was there the 10th July, 1859; plaintiff was there, with some of his musicians. Another brass band was already there before Bernard's. He usually commenced playing at 2 or 2½ P. M.; Bernard was there at 2 P. M. this time."

On cross-examination, the same witness testified as follows:

"They had a shooting-gallery, quoits, swings, ten-pin alley, flying-horses, refreshments, beer, ice-cream, wine, etc., at the park on Sunday, the 10th July last. Bernard's band had one big fiddle, and other fiddles, and one brass wind instrument; I don't now recollect the tunes played. I can't say I

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saw any one drunk there the 10th of July last. There were no funeral or religious services there. I don't know whether Bernard offered to play there that day; neither he nor his men did play. Bernard had played two or three Sundays before. They had a place at the park for German ladies to dance at their festivals. That which I call sacred music is holy music, five-string music—that which cannot be performed by a brass band. Among the tunes played were a good many overtures; there were some national airs—I do not remember what. There was no meeting; nobody that 'kept meeting;' all met there—some at tables, for glasses of beer, etc. I don't think you would find such things in churches. People might have been there for the charitable purpose to keep the owners up and not let them go to ruin. Defendants kept the park, like all other parks, to make money from, of course. We had a band to draw a great crowd into the park; the stand where the band played was near the bar and house, in the front part of the park, under the largest trees."

Being re-examined, he further testified as follows:

"Bernard had been paid fifty dollars a Sunday for playing. The defendants had all these things in the park in order to make money. The music was advertised in all the papers."

Plaintiff next called G. L. Rölker, who testified as follows:

"I knew Hyde Park in the spring of 1859. I was present at the contract; it was fifty dollars pleasant Sundays, twenty-five dollars bad weather. I attended to the bar, and was there second and third Sundays in May; Bernard's band played; I sold beer at the bar; there were four other bar-keepers."

Cross-examined.—"They might have sold whisky. The swings, etc., were in operation; there were many people there."

Plaintiff next called John H. Lindemaier, who testified that he attended to the advertising of the programme for defendants, at Hyde Park.

Cross-examined.—"The advertising was done to draw a crowd. I heard Bernard's band play some sacred music, as

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played in churches; it was sacred music; sacred music is such as touches the heart; I don't know the names of the tunes. Sacred music is solemn music, such as don't harm anybody; brass bands sometimes play sacred music; the air 'O, Susanna,' if well played, would be sacred music. On no Sunday did I see any one pray at Hyde Park; I saw families sitting on the grass there; it might have been a kind of meeting; they were drinking beer and sherry-cobblers. I can't tell what I mean by sacred; the word 'sacred' was in the advertisements."

Plaintiff next called H. C. Nordman, who testified as follows:

"I play on tenor violin; was at Hyde Park, as one of plaintiff's band, on the 10th of July; we were not permitted to play; I did not see any of plaintiff's band present. When we did play, we played overtures, sacred marches, and selections from operas. I have been a musician from a child. Some of those pieces were solemn, some light; a piece that has quick time I call light; I think that light music is as sacred as any music that ever was played; Mozart's Symphony has much quick time in it. The music played was generally of the run of a sacred concert. On July 10, Bernard was at Hyde Park twenty-five or thirty minutes before the usual time, with his band, consisting of thirteen or fifteen musicians."

Cross-examined.—"The band played ten or twelve pieces of a Sunday afternoon. Sacred music is solemn, such as the overture to Norma, Gems from the Bohemian Girl, which we played. We played all kinds of opera music, sacred music from Mendelsohn's Midsummer's Night Dream, and some things from Lucretia Borgia. I do not know whether sacred music has any connection with religious things; it may have, or may not. Gambling is called sacred by gamblers."

Plaintiff next called Louis Sanguinett, who testified as follows:

"I have been a musician from infancy. I was one of Bernard's band, and have played the same pieces in churches as

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I played at Hyde Park; I was one of those not allowed to play. It was sacred music we played there; national airs are also sacred."

Cross-examined.—"By sacred music I mean opera music, which is generally played in Italy in churches. I cannot explain what the word 'sacred' means; I mean by it what is sweet, not noisy; the opera *I Puritani* is sweet and sacred. I don't know any music that we could have played there that would not have been sacred; if Yankee Doodle had been played, it would have been sacred."

The defendant Lüpping then called Wilson Mooney, who testified as follows:

"I know Hyde Park; knew it this spring; Fred. Lüpping told me they had that park. I was there one Sunday when there was drinking, rolling ten-pins, swinging, etc. There was no religious worship, or funeral, or meeting for charitable purposes, on the 10th of July, Sunday; people went there for pleasure, and for the purpose of getting refreshments; I can't say what tunes were played; besides the programme, the band played such tunes as were called for by the bystanders."

Cross-examined.—"I am still at Hyde Park; it is a place of recreation; there is no dancing there on Sunday."

Defendant Lüpping then called Augustus Schroeder, whose testimony was as follows:

"I was employed at Hyde Park, as barkeeper, last spring. I saw Bernard there on the 10th day of July; he had no instrument, and some of his men were there without instruments. I was busy, as barkeeper, and sold sherry-cobblers, etc. There were two music stands in the park on that day; I have seen twelve musicians on the smaller stand."

S. Eaton and J. C. Moody, for appellant.

I. A contract to do an act contrary to a penal statute is void, and no action can be maintained thereon. (2 Pars. on Cont. 252; *Skinner v. Henderson*, 10 Mo. 205; *Foster v. Taylor*, 5 Barn. & Ald. 887.)

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II. The contract between the parties was contrary to the statute (R. C. 1855, p. 630, § 33) relating to Sunday labor.

III. The statute is constitutional. (*State v. Ambs*, 20 Mo. 214; *City of St. Louis v. Caffarata*, 24 Mo. 94.)

IV. Calling beer-garden concerts by the name of sacred concerts does not change their character, nor exempt them from the operation of the legal rule.

No brief on file for respondent.

DRYDEN, Judge, delivered the opinion of the court.

The defendants were the keepers of Hyde Park, in St. Louis, a place of public amusement of extensive resort, where various sports were provided for the entertainment of visitors, such as quoits, ten-pin alleys, shooting-galleries, swings, and flying-horses; and where beer, wine, ice-cream and other refreshments were sold and consumed; and to add to the attractions of the place of Sundays, the services of a band of musicians were in requisition. The plaintiff, it seems, was the leader of a musical band, and was under contract with the defendants, by which he was to render them the services of his band on Sundays at the sum of fifty dollars per day in good weather, but in bad at twenty-five dollars. On Sunday, the 10th of July, 1859, the plaintiff was on hand, in full force, in due time, ready for the performance, but the defendants, whether without cause or for good cause is not material, refused to accept his services. The plaintiff then sued the defendants, before a justice of the peace, for fifty dollars' damages for breach of the contract, where he recovered a verdict and judgment, from which the defendants appealed to the Law Commissioner's Court, where a trial was had resulting as the first—from which last judgment the defendants have appealed to this court.

On the trial in the Law Commissioner's Court, after the plaintiff had proved the contract and its breach, and the character of the performances and exercises, as above stated, at Hyde Park, the defendants asked the court to instruct the jury that, upon the plaintiff's own evidence, he could not

recover a verdict; but the court refused so to instruct. The instructions ought to have been given. The plaintiff had himself shown that the work contemplated by his contract had none of the characteristics of "the household offices of daily necessity, or other work of necessity or charity," but was of a kind in plain violation of a wholesome statute, and its performance was from considerations purely mercenary. The law could not, without casting reproach upon itself, lend a helping hand, as in this case it is asked to do, to enforce a contract made in contempt and disregard of the law.

Let the judgment be reversed and the cause dismissed; the other judges concurring.



THE STATE OF MISSOURI, Respondent, v. SOLOMON ROSE,
Appellant.

Juror.—A juror who has formed or declared an opinion upon the matter in issue is competent to serve, if the opinion was founded only on rumor and did not bias or prejudice his mind. (R. C. 1855, p. 1191, § 14.)

Instructions.—It is the duty of the court to refuse instructions having no application to the case as made by the issues and the evidence; and to give plainly expressed instructions to assist the jury in the application of the evidence given.

Appeal from Clark Circuit Court.

The opinion sufficiently states the facts of the case.

The following are the instructions given for the State:

1. The defendant is charged with murder in the first degree, by having wilfully, deliberately, and premeditatedly killed Lorenzo D. Barlow. The word "wilful," as here used, means intentional, not accidental. The word "deliberately" means a cool state of the blood; that is, not a heated state of the blood caused by lawful provocation; and the word "premeditatedly" means thought of beforehand—any time, no matter how short. The word malice means a wrongful act done intentionally, without just cause or excuse.

2. If the jury believe from the evidence in the cause, that

the defendant wilfully, deliberately, and premeditatedly, as above defined, struck the deceased with a spade, on or about the 30th of January, 1858, at the county of Clark, thereby giving to the said Barlow a mortal injury, of which he died on the night of said day, it will be their duty to find the defendant guilty of murder in the first degree.

3. If the jury believe from the evidence in the cause that the defendant Rose did not strike the said Barlow with the specific intent to kill at the time, but with the design maliciously to inflict upon the said Barlow great bodily harm; and that the said Barlow came to his death by a wound inflicted under such circumstances, then such killing is murder in the first degree, and the jury should so find.

4. Although the jury may believe from the evidence in the cause that the deceased man Barlow used insulting and opprobrious language towards the defendant Rose, yet this afforded neither justification, provocation, palliation, or excuse, for the striking by Rose; and if the jury find from the evidence in the cause that the defendant Rose struck the deceased under such circumstances with a spade, and that it was an instrument likely to produce death or great bodily harm, and that he did so without the intent to kill, but with the intent maliciously to inflict upon the said Barlow great bodily harm, and that he came to his death by an injury so inflicted, then the defendant is guilty of murder in the first degree, and the jury should so find.

5. If the jury find from the evidence in the cause that the said Barlow had a knife in his hand, in front of Crane's grocery, and that high words passed between the parties; and that, afterwards, the said Barlow started up north, and that defendant Rose went some distance south, and then returned with a spade and followed Barlow and struck him, then he, Rose, was not justifiable or excusable in so doing, nor was there any provocation. And, if the jury find from the evidence in the cause that the defendant Rose struck the deceased Barlow with a spade under those circumstances, and that it was an instrument likely to produce death or great

bodily harm, and that he struck without the intent to kill, but with the intent maliciously to inflict great bodily harm upon the said Barlow, and that the said Barlow came to his death by an injury so inflicted, then defendant is guilty of murder in the first degree, and the jury should so find.

6. If the jury entertain a reasonable doubt of the guilt of the defendant, they should acquit. But a reasonable doubt to authorize an acquittal, must be a substantial doubt arising out of the evidence in the cause, and not a mere possibility of defendant's innocence.

7. The jury have a right, under the present indictment, to find the defendant guilty of murder in the first or second degree, or of manslaughter in the first, second, third or fourth degree.

8. If the jury find the defendant guilty of murder in the first degree, they will simply so state in their verdict. If the jury find the defendant guilty of murder in the second degree, they will so state in their verdict, and assess his punishment at not less than ten years' imprisonment in the penitentiary.

9. If the jury find the defendant guilty of manslaughter, they will state the degree in their verdict.

10. If the jury find defendant guilty of manslaughter in the first degree, they will assess his punishment to imprisonment in the penitentiary not less than five years; if in the second degree, by a like imprisonment not less than three nor more than five years; if in the third degree, not exceeding three nor less than two, or by imprisonment in the county jail not less than six months, or by a fine of not less than five hundred dollars, or by both a fine not less than one hundred dollars, and imprisonment in the county jail not less than three months; if in the fourth degree, by imprisonment in the penitentiary two years, or in the county jail six months, or a fine of not less than five hundred dollars, or by both a fine of not less than one dollar and imprisonment in the county jail not less than three months.

Instructions offered for defendant :

1. If the jury believe from the evidence that, at the time of the difficulty, the deceased was attempting to commit, on the person of the defendant, great bodily harm, and he struck in defence of his person, then they should find him not guilty.

2. Although the jury may believe from the evidence that the deceased retreated a short distance before the rencounter, yet if they believe that such retreat was resorted to by the deceased for the purpose of drawing the defendant into the difficulty, and as a means of inflicting upon him great bodily harm, and at the time the blow was inflicted the deceased was in the attitude and ready to strike the defendant with a knife, then they should find the defendant not guilty.

3. If the jury believe that the blow was given by Rose under a reasonable apprehension that the deceased was about inflicting upon him great bodily harm, then there was no malice, without which there can be no murder.

4. The jury have the right to take into consideration the acts and threats of the deceased at the time of the difficulty as showing the state of the mind of the deceased towards the defendant.

5. If the jury believe that there is a reasonable probability that the deceased came to his death by any other means than at the hands of defendant, they should find him not guilty.

6. The law presumes the innocence of the accused until his guilt is clearly made out to the exclusion of a reasonable doubt.

7. If the jury, upon an examination of the whole case have a reasonable doubt of the guilt of the defendant, they should acquit.

Of which instructions the court refused numbers one, two and three, and gave numbers four, five, six and seven.

The court, on its own motion, gave the following instructions:

1. If the jury, from the evidence in the cause, entertain a reasonable doubt upon any material fact constituting the offence charged in the indictment, then the defendant is en-

titled to the benefit of that doubt, and it will be their duty to find the defendant not guilty.

2. If the jury should find from the evidence that Rose struck Barlow with a spade, but without any intent to kill or do him, the said Barlow, any great bodily harm, then they cannot find the defendant guilty of murder in the first degree.

Givens, Bush & Cowgill, for appellant.

I. The court erred in retaining upon the panel the names of Turner, Davis, and Hamersly, returned by the sheriff. The first two had formed and expressed opinions as to the guilt or innocence of the defendant, founded, as they said, upon rumor; but they had heard a great deal said about the matter, and if the evidence turned out as they had heard it, their minds were made up and fixed,—having thus formed opinions when not under oath, and not having the law arising upon the facts expounded to them by the court. Hamersly had heard the circumstances detailed to him by a witness, but had formed no opinion as to the guilt or innocence of the defendant. Neither of the jurors were asked if they had formed any opinion upon any material fact in the case, which they all may have done from aught that appears from the evidence. (R. C. 1855, p. 1191, § 14.)

II. The second instruction tells the jury that if the defendant struck the deceased with a spade wilfully, deliberately and premeditatedly, and he died of the wound, then defendant was guilty of murder in the first degree, without telling them that it should have been done in malice, and with the intention to kill, both of which are essential ingredients in the crime of murder in the first degree. (Bonner v. State, 5 Mo. 379-80.)

III. The third instruction tells the jury that if the defendant did not strike the deceased with the specific intent to kill, but with the design maliciously to inflict upon him great bodily harm and that death ensued, then defendant was guilty of murder in the first degree. Now, it is insisted that

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striking another even with a deadly weapon, without the intent to kill, but with the intent to do great bodily harm, and death ensues, is not murder in the first degree under our statute. The statute defining murder in the first degree, it is believed, was taken from the Pennsylvania statute upon the same subject. Under that statute, the courts of that State have decided that giving one a mortal blow, but with the intent only of inflicting great bodily harm, is not murder in the first degree—that the intent to kill must exist. (Wharton's Crim. L., 3d ed., 494.)

IV. Instructions numbered one, two, and three, asked for the defendant, should have been given. They present the law substantially as defined by the Revised Statutes of 1855. (4th sec. of the act "Crimes and Punishments," art. 2, p. 559.) The first instruction was manifestly proper, as it presents the law of self-defence at common law independent of the statute.

Voullaire, for the State.

I. The court properly refused to strike from the panel the names of the three jurors, Turner, Davis and Hamersly. They were competent jurors. (2 R. C. 1855, p. 1191, § 14; State v. Baldwin, 12 Mo. 223; State v. Davis, 29 Mo. 391.) If any objection could be made to the three jurors, the defendant should have challenged them for cause.

II. In the instruction marked number one, given on behalf of the State, the meaning of "deliberately" is simply defined, as it is in all instructions and in the law books. It is the best definition of that word as adapted to criminal law. The court, in that instruction, does not undertake, as in the two cases cited by defendant, (State v. Dunn, 18 Mo. 419, and State v. Jones, 20 Mo. 58,) to instruct the jury upon any other point or legal proposition in connection with said word. And the court afterwards, in instructions marked number four and five, defines what lawful provocation is, as far as the case is concerned and the evidence in the cause will permit. The court ought not to instruct the jury upon all questions

of lawful provocation; but must confine itself to such questions of lawful provocation as appears by the evidence. The question of lawful provocation is a question of law, and may differ according to the nature of the case and testimony. What has been said about the word "deliberately" can also be applied to the word "malice," as defined in said instruction. (State v. Schultz, 25 Mo. 128-151; State v. Harelin, 25 Mo. 111, 121, 126-7; State v. Hays, 23 Mo. 287, 325; Conn v. Green, 1 Ashmead, 289-299, ("The first inquiry," &c.)

III. Instruction number two, given on behalf of the State, is correct. It is a continuation of the first instruction, which defines murder in the first degree, and must be taken in connection with it. The jury in passing upon this second instruction must have had the first one in view. Besides, under our statutes, every deliberate or intentional killing is murder in the first degree, and the words "malice and intention to kill," complained of by defendant to have been left out in said second instruction, are embodied in the words "wilfully, deliberately and premeditatedly." If the jury should have found defendant guilty under that instruction, they would have to find that the act was done with malice and intention to kill. (State v. Dunn, 18 Mo. 419-424; State v. Phillips and Ross, 24 Mo. 475-487; Penn v. Honeyman, 1 Add. 147-8; Conn v. Dougherty, 1 Browne, 18.)

IV. The third and fourth instructions are also correct. Under our statutes it is not necessary that the party intended only to kill, to constitute murder in the first degree—giving a fatal stroke wilfully and maliciously, and with intent to inflict great bodily harm, is sufficient. Defendant contends that our law of murder in the first degree is the same as the one of Pennsylvania. That proposition is not entirely correct, because in our statute the words "or other felony" are added to the definition of the crime. (State v. Neuslin, 25 Mo. 111, 121, 126, &c.; 1 Mo. Stat. 1858, p. 558, § 1; Whart. Crim. L., p. 421, Law of Penn.)

V. The fifth instruction is also correct. Witnesses had testified somewhat differently about what had taken place before

the killing. It was the province of the jury to pass upon all the evidence adduced, which, of course, they must have done; and it was proper for the court to instruct the jury on such parts of the evidence as appeared to him clearly proved, and which he presumed were offered in justification of the murder, and to tell the jury, if they find such facts from the evidence, that they do not constitute any lawful provocation. (State v. Hays, 23 Mo. 287-318, 3d instruction; State v. Dunn, 18 Mo. 419-425; People v. Shorter, 2 N. Y., Comstock, 193-202.)

VI. The court properly refused to give instructions one, two and three, asked by defendant. They do not contain the law of self-defence, and there was no evidence that authorized instructions on the question of justifiable homicide. (1 Mo. Stat. 1855, p. 559.) Instruction number four, given on behalf of defendant, cures sufficiently such error, if any occurred by the court, in refusing to give instructions one, two and three.

VII. The defendant having been acquitted of murder in the first degree and convicted of murder in the second, he appeals only from this last verdict, and cannot complain of any errors having occurred either by the court giving improper instructions as to murder in the first degree, or refusing to give proper instructions concerning that crime in that degree. The jury, by their verdict, have resolved all wrongs or errors, if any existed, in favor of defendant. In reality, there is no instruction on the subject of murder in the second degree, except the one reciting what the punishment is for murder in the second degree; and the jury, by their verdict, must have found the defendant guilty under that instruction only which is correctly stated. The question of murder in the first degree is not before this court, and defendant cannot be tried for that crime again.

BATES, Judge, delivered the opinion of the court.

The defendant was indicted for murder in the Circuit Court of Clark county, at the September term, 1858. He

was tried at the April term, 1861, and found guilty of murder in the second degree, and sentenced to be imprisoned in the penitentiary for ten years.

It appears by the record that thirty-six persons, summoned as jurors, were sworn on their *voir dire*, when one of them, James Turner, being examined, stated that he had formed an opinion as to the guilt or innocence of the accused; that that opinion was founded upon rumor, and was not such as to prejudice or bias his mind so that he could not give the defendant a fair trial. He further stated that he could hear the evidence, and give the defendant a fair and impartial trial, regardless of the opinion thus formed from rumor; that he had heard the circumstances attending the killing by several persons, but did not know them to be witnesses; that he did not know who the witnesses were; and if the case should turn out to be as he had heard it, his mind was fixed and made; and that the opinion he had first formed remained still, and that he had never heard any person talk about the case who pretended to know any of the facts themselves, but they spoke of them as though they had heard them from others.

The defendant moved that the name of the juror be stricken from the panel, which motion the court overruled. The name of the juror (Turner) appears in the list of the jurors who tried the case.

The 14th sec. of art. VI. of Practice in Criminal Cases (2 R. C. 1855, p. 1191,) provides that "it shall be good cause of challenge to a juror that he has formed or delivered an opinion on the issue or any material fact to be tried; but if it appear that such opinion is founded only on rumor, and not such as to prejudice or bias the mind of the juror, he may be sworn."

The case of the juror (Turner) comes fully within the exception in that section, and he was a competent juror, and the court committed no error in refusing to strike his name from the list.

When E. B. Davis, another of the panel of thirty-six, was examined, he stated that he had formed and expressed an

opinion; that his opinion was founded on rumor, but he did not think it would be in his way of giving the accused a fair and impartial trial, according to the law and evidence, regardless of the opinion he had formed; that he had the same opinion still, and that it would take evidence to remove it; that he had heard a great deal said about the circumstances of the case, and if it should turn out in evidence as he had heard, his mind was made up on the subject of the guilt or innocence of the accused; but he had never heard anybody talk about the case who pretended to know anything of the facts themselves—they spoke as though they had heard these things from others. The defendant moved that the name of this juror be stricken from the pannel, which the court overruled. The name of this juror does not appear in the list of those who tried the case, nor does it appear that he was challenged either for cause or peremptorily, nor anything from which it can be inferred that the defendant has suffered any injury by his being retained on the list of thirty-six. His case does not come within the exception in the clause of the statute above quoted. It does not appear affirmatively that his opinion was not such as to prejudice or bias his mind, and in that, does not fulfill the requirements of the statute; but, as he was not upon the jury which tried the case, and the defendant was not otherwise injured by the action of the court in reference to him, there is in it no reason to reverse the judgment.

When G. R. Hamersly, another of the thirty-six, was examined, he stated that he had not formed or expressed an opinion in regard to the guilt or innocence of the accused, but that he was present at one time when Jonathan Hewitt, a witness for the State, gave a history of the transaction; but that he had formed no opinion after hearing the history of the matter; that Hewitt was not talking to him, and he did pay much attention to what he said, nor did he remember the conversation now; that he had no opinion as to the guilt or innocence of the defendant, or upon any material issue in the case, and that what he had heard would not be in his

way in making up his verdict. The court overruled the motion made by the defendant to strike his name from the list. His name does not appear in the list of the jurors who tried the case, nor does it appear that he was challenged either for cause or peremptorily. He was a qualified juror; but if he were not, the defendant has suffered no injury on his account.

The case being tried, it appeared in evidence that the defendant and the deceased were engaged in a verbal altercation, during which the deceased held in his hand an open knife concealed behind his person; that the defendant advanced as if to strike the deceased, when a bystander called to him that deceased had a knife. Defendant then sprang back, and throwing off his coat went a few steps (southward) and picked up a spade which was lying there on a pile of sand. When the defendant sprang back from the deceased, he (deceased) started in the opposite direction, (northward,) retreating slowly, walking backward, leading his horse by the bridle, and still holding the knife in his hand. When the defendant picked up the spade, he immediately turned and pursued the deceased until he overtook him, and struck him on the head with the spade a blow which caused his death a few hours afterward.

The court gave to the jury ten instructions on the part of the State, two on its own motion, and four on the part of the defendant; and refused three asked by defendant. The first five instructions given on the part of the State, all define and have reference only to the crime of murder in the first degree. The defendant was found guilty of an inferior grade of crime, and it is not perceived how the defendant could have been injured by them, or upon what grounds he can complain of them. It is true that the jury may have been induced by those instructions to find the defendant not guilty of the first degree of murder, which is their verdict as to that degree; and he thus has the advantage of them, and has suffered no injury in regard to the charge of that degree of murder. As they have no reference whatever to the de-

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gree of murder of which he was found guilty, they could not have influenced the jury in so finding their verdict. Therefore, no opinion is given as to the legal propriety of those instructions. The same remarks apply to the second instruction given by the court on its own motion.

The last five instructions given on the part of the State, and the first given by the court on its own motion, are not specifically objected to in this court, and having examined them carefully, we find no error in them.

The three instructions prayed by the defendant, and refused by the court, refer entirely to the law of self-defence, and therefore had no application to this case, in which there was no evidence at all that the killing was done in self-defence. Instructions should, in reality, be aids to the jury in forming a correct verdict, and it is as much the duty of the court to refuse instructions which have no application to the case and which might confuse the jury, as it is to give plainly expressed instructions in reference to the evidence given to assist the jury in its application.

Judgment affirmed. Judge Bay concurs. Judge Dryden having been of counsel in the court below, did not sit in this cause.



MARY LITTLETON, Respondent, v. WINIFRED PATTERSON, Appellant.

Limitations.—The act limiting actions for the recovery of real estate, of February 24, 1847, and the same act R. C. 1855, p. 1045, does not include the limitation of suits for dower.

Appeal from St. Louis Land Court.

The plaintiff sued the defendant in the St. Louis Land Court, for dower, beginning the suit February 23, 1859.

Among other defences, defendant answered that she, and those through whom she derived her title, had been in the continuous possession of the lot in which dower was sought

more than ten years before the commencement of this suit, claiming the same adversely to all the world; and that plaintiff had not claimed dower therein for more than ten years next before the commencement of this suit.

Upon the plaintiff's motion, the court struck out this defence; to which decision of the court the defendant duly excepted.

Upon the trial the following facts were agreed to, to-wit: That the plaintiff was married to William Littleton in 1828; that he died January 4, 1849; that on the 3d June, 1839, he was entitled to and possessed of said lot, and on this day he conveyed the same to Bernard Finney, in the deed whereof his wife, the plaintiff, joined; that the certificate of her acknowledgment was in due form in all respects, except that it omits to certify that she acknowledged the same in examination apart from her husband, and that there was a privy examination of the wife; that said deed was immediately recorded; that parties deriving from said Finney title to said lot, including the defendants, took possession of said lot prior to 1847, and ever since have had it, claiming the same adversely to all others; that plaintiff did not claim dower therein within twelve months after Littleton's death, nor was she informed by defendant, or any of those she claimed under, during this period of time, that they denied plaintiff's right of dower therein.

Under these facts, the court decided that plaintiff was entitled to dower in said lot; and dower was adjudged accordingly, in money, under a jury's verdict, the lot not being susceptible of a division. A motion was made for a new trial, and overruled, to which decision exception was duly taken, and from the judgment for the plaintiff the defendant appealed to this court.

Todd, for appellant.

The law of this State, passed in 1847 and still subsisting, limiting "the time for commencing actions relating to real property," is applicable to and embraces the action for the

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recovery of dower. (Sess. Acts 1847, p. 94; Jones v. Powell, 6 J. Ch. Rep. 194-197; Tuttle v. Wilson [Wilcox], 10 Ohio, 24; Berrien v. Conover, 1 Harrison, 107, N. J.; Ramsey v. Dozier, 1 Const., S. C., 112; 4 Kent's Com. 62, 72, 69; Stokes v. McAllister, 2 Mo. 164; Park on Dow. 311 [margin], 9 vol. Law Lib.; Ang. on Lim. 379-81.)

The kind of actions limited are expressed in these words: "No action for the recovery of any lands, tenements, or hereditaments, or for the recovery of the possession thereof," etc.

No language could be more effectual or operative to embrace every kind of action whose object was and whose successful judgment would be a recovery of the possession of the land. "No action" is an absolute and universal negation of every and all kinds of action, purely "real" or "mixed," in law or equity, whose common demand and judgment be a "recovery of the possession of land," etc. The acts of New York, New Jersey, South Carolina, and of Ohio, under consideration in the cited cases, are not of broader terms, nor do they agree in terms, and resort is had in construction, in the New Jersey and New York cases, to the proper policy and spirit of the act.

The Ohio and New York cases decide that the action for dower is a possessory action. (See, also, 4 Kent's Com. 72, 62, 69; and 2 Mo. 164, Stokes v. McAllister, referred to.)

The South Carolina case decides it to be a real action. (Also see p. 379 Ang. on Lim.)

The New Hampshire and Massachusetts courts admit that this action is one for the recovery of land. (3 N. H. 127; 4 N. H. 107, 109; 7 Mass. 26, 27; 1 Dev. & Bat., N. C., turns upon the special words of the N. C. law, p. 215.)

1 Dudl. Ga. 126 (Wakeman v. Roache), and 10 Yerg. Tenn. 339, 341, turn upon several reasons; and especially, as it appears, for the reason that the possession of the heir and legal representatives of the husband cannot be deemed adverse to the widow, the suits in those cases being against such persons.

It extends the class of persons under whose seizure or pos-

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session claimants shall be limited, so as to embrace the seisin and possession of any and all persons. The legal operation of this is to embrace all rights and titles depending upon a prior seisin or possession as an essential to the right.

The right of dower is one of these: seisin, marriage, and death—each and all being essential to it. And without this extension the case of dower might be said to be omitted, because the husband is neither “ancestor,” “predecessor,” or “grantor” of the wife.

The act of 1847 differs from those of 1835 and of 1845 in this important respect again, besides the answer already made to those decisions of New Hampshire and Massachusetts.

Lackland, Cline & Jamison, for respondent.

I. So far as we are able to perceive, the only question arising upon the record is whether the statute of limitations, passed February 2, 1847 (Sess. Acts 1847, p. 94), is a bar to an action for dower. As it appears by the record that William Littleton, the husband of the plaintiff, died 4th January, 1849, the above statute is supposed to be applicable to the case.

The English statute, 21 James I., chap. 16, § 1; and 32 Henry VIII., chap. 2, were never held to bar suits for dower.

The section of the statute of limitations of Missouri is framed in analogy to the statute of 32 Henry VIII., chap. 2, which is as follows, to-wit:

“No manner of person or persons shall, from henceforth, sue, have or maintain any suit or right, or make any prescription, title or claim, of or to any manor, lands, tenements, rents, annuities, commons, pensions, portions, corrodies, or other hereditaments of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his or their *ancestor or predecessor*, but only of the seisin or possession of his ancestor or predecessor which hath been, or now is, or shall be seized of the said manors, lands, tenements, rents, annuities, commons,

pensions, portions, corrodies, or other hereditaments, within three-score years next before the teste of same writ, or next before the said prescription title or claim so hereafter to be sued, commenced, brought or had."

In Comyn's Digest, Temp. G. 9, it is said: "But the statute 32 Henry VIII., c. 2, does not extend to a writ of right of dower; for the plaintiff does not count of her possession, nor of the seisin of any ancestor, and therefore it is out of the statute."

In Moore v. Frost, 3 N. H. 126, it was held that if the above statute applied to suits for dower, it did not begin to run from the time the husband ceased to be seized, but merely from his death.

In the case of Bernard v. Adams, 4 N. H. 107, the point was fairly met, and the court decided that the above statute was not a bar to a suit for dower.

The following authorities, as well as those heretofore cited, seem to establish the proposition that a general statute of limitation is no bar to a suit for dower, unless such suit be specifically named or included by irresistible implication: May v. Rumny, 1 Mich. 1; Campbell v. Murphy, 2 Jones' Chy., S. C., 357; Keddall v. Trumble, 1 Md. Chy. Dec. 143; Spencer v. Weston, 1 Dev. & Bat., N. C., 213; Durham v. Angier, 20 Me. 245; Wells v. Beall, 2 Gill & Johns. Md. 468; Jones v. Powell, 8 Johns. 103; Dellebaugh's Estate, 4 Watts, 177; Sayre vs. Wisner, 8 Wend., N. Y., 661; 1 Swift's Dig. 85, t. p. 89; Park on Dower, 311; 4 Kent's Com. 70; 1 Hill on Rl. Prop. 176-7; 1 Wash. on Rl. Est. 250, § 1 & 2.

II. The argument which pervades the cases above referred to appears to be that dower is a right *sui generis*; that the general statutes of limitations of England, as well as of the United States, including that of this State, above quoted, contemplate the case of a seisin which once existed, and from the termination of which the statute begins to run. But a widow, before assignment of dower, is not seized, and has no right of entry, nor would an entry be of any avail to her; nor has she

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any right of possession ; nor is she a tenant in common with the heirs. She is not entitled to an undivided third of the land, but is entitled to one third part in severalty. Her suit for dower is not of her seisin, nor of the seisin of her ancestors, nor her predecessors ; neither is it an action *possessorie*. (Park on Dow. 311 ; 1 Hill. on R. P. 176 ; 7 Ga. 29 ; 1 Yeates, 425 ; 9 Mass. 13 ; 4 Mass. 388 ; 7 Johns. 247 ; 17 Johns. 167 ; 20 Johns. 411 ; 5 Mumf. 346 ; 16 Mass. 193 ; May v. Rumny, 1 Mich. 1 ; 1 Cru. Dig. 159 ; Coke Lit. 36, note a. ; 16 Mass. 139.)

It is well settled there must be an adverse possession before the statute of limitations can begin to run. (8 East. 248 ; 2 Bos. & Pul. 542 ; 1 Dall. 67 ; 1 Cain. 394 ; 1 Johns. 156 ; 2 Johns. 156 ; 2 Johns. 230 ; 1 Wash. 37 ; 4 Cranch, 367.) The widow's right to dower is not adverse to heirs or feoffee of the husband. (1 Mich. 12.)

The widow cannot enter upon the land for dower until it is assigned to her. A cause of action to recover the possession of the land does not accrue until after assignment. An action of ejectment for her dower cannot be maintained until after assignment thereof. No cause of action to recover the land, or the possession thereof, exist in behalf of a widow until after the assignment of her dower, and her application for such assignment is not within the statute. (Jackson v. O'Dougherty, 7 John. 247 ; Jackson v. Vanderhyden, 17 John. 167 ; Jackson v. Aspell, 20 Johns. 411 ; Wakeman v. Roache, Dudl. 123 ; Toaki v. Hardemann, 7 Geo. 30.)

III. The 21st section of the act of 1845 (R. C. 1845, p. 433) gives the widow four grounds upon which she may commence her suit for dower : 1st, where she is deforced thereof ; 2d, where she cannot have it without suit ; 3d, where her dower is unfairly assigned ; and 4th, where her dower is not assigned to her within twelve months after the death of her husband.

There is no pretence that she was deforced of her dower, nor that it could not be assigned without suit ; as we suppose this provision relates to cases where the parties interested are

minors, etc., who can only act through the instrumentality of a court of justice.

Nor was there any unfair assignment of her dower. The record shows simply that the dower of the plaintiff was not assigned to her within twelve months after the death of her husband.

It will be observed that the above 21st section of the act concerning dower, 1845, which is the same as the 26th section of the act of 1855, regulates the widow's right to sue for dower. Under this section, her cause of action did not accrue until twelve months after the death of her husband; so that if this case be within the statute of limitations, it did not commence to run until twelve months after the death of her husband. Her husband died on the 4th January, 1849. Under this view, her cause of action did not accrue until the 4th January, 1850; and the statute did not begin to run until the last-mentioned date; and her cause of action was not barred until the 4th January, 1860; and this suit was commenced on 23d February, 1859, which was in time.

The following cases are relied upon by appellant to show that the plaintiff's right to sue in this case is barred: *Caston v. Caston*, 2 Richs. Chy., S. C., 1; *Lide v. Reynolds*, 1 Brev., S. C., 76; *Ramsey v. Dozier*, 3 Brev., S. C., 246; *Boyle v. Rowland*, 3 Dev. Chy., N. C., 555; *Wilson v. McLenaghan*, 1 McM. Chy. 35; *Ramsey v. Dozier*, 1 Const., S. C., 112; *Mitchell v. Payas*, 1 Nott & Mc., S. C., 85; *Berrier v. Conover*, 1 Harr., N. J., 107; *Torry v. Minor*, 1 S. & M. Chy., Miss., 489; *Tuttle v. Wilson*, 10 Ohio, 24.

The above cases referred to from South Carolina were decided under a statute in the following words: "If any person to whom any right or title to lands, tenements or hereditaments shall descend or come, do not prosecute the same within five years after such right or title accrued, then he, she or they shall be forever barred to recover the same."

The case from Mississippi was decided under the following statute, passed in 1802, revised in 1816: "§ 1. (Limitations of real and mixed actions, twenty years.) From and after

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the passing of this act, every real, possessory, ancestral, mixed or other action for any lands, tenements or hereditaments, shall be brought and instituted within twenty years next after the right or title thereto, or cause of such action accrued, and not after,¹ provided," etc. (Hutchinson's Miss. Code, 1798 to 1848, p. 824.)

The case from New Jersey was decided under the following statute, viz: "Every real, possessory, ancestral, mixed, or other action for any lands, tenements, or hereditaments, shall be brought or instituted within twenty years next after the right or title thereto, or cause of such action, shall accrue, and not after."

And the Ohio statute, upon which the case from that State was decided, is as follows: "No person or persons shall hereafter sue, have or maintain any writ of ejectment or other action for the recovery of the possession, title or claim of, to or for any land, tenements, or other hereditaments, but within twenty-one years next after the rights of such action or suit shall have accrued," etc.

Between the statutes of New Jersey, Ohio, South Carolina and Mississippi, above quoted, and those of England, New Hampshire, North Carolina, Tennessee, Massachusetts, Maryland, Pennsylvania, Michigan and Missouri, there are many marked differences.

By the statutes of the first four States above named, it will be perceived that limitation does not begin to run until the *cause of action accrues*; while the statutes of England and the rest of the States above named begin to run from the date of the *disseisin* or *dispossession* of the plaintiff, or those under whom the plaintiff claims.

DRYDEN, Judge, delivered the opinion of the court.

The only question arising in this case is whether the law limiting actions for the recovery of real estate, approved February 2, 1847 (Sess. Acts 1847, p. 94), and carried into the revision of 1855 (R. C. 1855, p. 1045), includes the limitation of suits for dower.

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The first section of the act is as follows :

"Sec. 1. No action at law, or suit in equity, for the recovery of any lands, tenements, or hereditaments, or for the recovery of the possession thereof, shall be commenced, had or maintained by any person, whether citizen, denizen, alien, resident or non-resident of this State, unless it appear that the plaintiff, his ancestor, predecessor, grantor, or other person under whom he claims, was seized or possessed of the premises in question within ten years before the commencement of such action or suit."

The second section relates to the sufficiency of an entry ; and the fourth section contains a saving of those under the usual disabilities from the operation of the limitation.

The law implies a previous seizure or possession of the thing demanded ; and the limitation is of the right of action or of entry caused by the disseisin, and dates from the time of the disseisin. The right limited is a *present, existing* right of action or of entry, and none the less so because the one in whom the right is vested is under some disability to sue. But the wife's right to dower is not of this sort. Until her husband's death her right is inchoate, imperfect, contingent upon her surviving him. She is not laboring under the disability contemplated by the saving clause of the statute to enforce an existing right of action, as would be the case if during coverture she was disseized of an estate that had descended to her, but she is without such right as is actionable. By the death of her husband, her right of action becomes complete. This right, however, is merely a *chose in action*, and not a right of entry or a right of action for possession, which depends for its existence on the assignment of dower ; and having no right of action or of entry until dower is assigned, her rights are not within the bar of the statute.

We are sustained in the conclusion at which we have arrived by the decisions of the English courts, and of the courts of most of the American States, based upon statutes substantially like our own. A different line of decision is found in New Hampshire, South Carolina, and one or two other States,

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resulting from the marked difference between their statutes of limitation and those of the States ranged on the other side of the question.

The other judges concurring, the judgment of the Land Court will be affirmed.



FREDERICK ORTH *et al.*, Respondents, v. HUGO DORSCHLEIN, Appellant.

Practice—Error.—The Supreme Court will not reverse the judgment of the court below unless it appear that error has been committed materially affecting the merits of the action. (R. C. 1855, p. 1300, § 34.)

Appeal from St. Louis Land Court.

This suit was brought on the 21st of September, 1859, in the St. Louis Land Court, to recover forty-seven acres of land in St. Louis county.

On the trial, the plaintiffs proved that Martin Householder, Sr., bought a farm of one hundred and sixty acres in St. Louis county, of which the piece in dispute is a part, in July or August, 1838; that Martin Householder, a son of Martin Householder, Sr., rented the farm for 1837 from John L. Wood; that an American rented the farm for the year 1836 from said John L. Wood; that Martin Householder, Sr., took possession of said farm when he purchased the same, and occupied it for more than twenty years; that said Martin Householder, Sr., had six children; that he divided the said farm among his children, and they paid him ten dollars a year each, during his life; that he died on the piece in dispute; that one of his daughters, Maria Eva, married Frederick Orth, Sr.; that Maria Eva died, leaving only two children, the said plaintiffs; that David Manchester and wife, by deed dated November 21, 1834, conveyed the said land to John L. Wood, who conveyed the same to Martin Householder, Sr., by deed dated July 24, 1838; that Martin House-

holder and wife and the other heirs of Martin Householder, Sr., conveyed the piece of land in dispute to plaintiffs, by deed dated April 25, 1859.

*The defendant proved that Frederick Orth, Sr., after the death of his first wife, the said Maria Eva, married a second wife, who is now the wife of defendant; that Frederick Orth, Sr., died, leaving a will, by which he devised all his interest in said land to his widow, who afterwards married the defendant.

At the instance of the plaintiff, the court gave the following instructions:

"If the jury believe from the evidence that the deeds read in evidence by the plaintiff are genuine; that Martin Householder died in possession of the land sued for; that said Martin Householder and those under whom he claimed the said land had the quiet and peaceable possession of said land for twenty years consecutively; that his heirs conveyed the said land sued for to the plaintiffs in this suit, then the jury will find for the plaintiffs, if the defendant was in possession of the land sued for at the commencement of this suit."

Defendant's instructions refused:

1. If Martin Householder, Sr., was not in possession of the premises in question at the time of his death, then the plaintiffs have not shown such an adverse possession as will entitle them to recover in the action.

2. If the jury find from the evidence that Martin Householder, Sr., in 1838, owned and possessed the property in question; that he had children, one of whom was named Maria Eva, who afterwards married Frederick Orth, and that the plaintiffs are children born of said marriage; and if the jury also find from the evidence that said Maria Eva acquired the property in question from her father; that she and her husband went upon the premises to reside after she so acquired the same, and continued to possess the premises in question with her husband to the time of her death; that her husband, after her death, continued to occupy the premises to the time of his death, then the plaintiff cannot recover

in this action unless the jury find from the evidence that Martin Householder, Sr., held exclusive and continuous possession of the premises in question for more than twenty years before his death, or that the plaintiff had such possession for twenty years before this suit was begun.

3. Although the jury may find from the evidence that the plaintiffs are the children and heirs at law of Maria Eva Orth, and grandchildren of Martin Householder, and that the plaintiffs are still infants, yet the plaintiffs cannot recover in this action unless the jury shall find from the evidence that the plaintiffs' mother or grandfather had continuous possession of the land in question for twenty years before the death of the mother of the plaintiffs, or that they themselves had such continuous possession for twenty years before this suit was begun.

Verdict for plaintiffs.

Krum & Decker, for appellants.

Lackland, Cline & Jamison, for respondents.

BATES, Judge, delivered the opinion of the court.

The judgment in this case is evidently for the right party, although, under the instruction given for the plaintiffs, it may well be doubted whether the jury might not (from the evidence preserved) have found a verdict for the defendant; and although some of the instructions moved by the defendant and refused might have been given without any violation of legal propriety, yet the merits of the action are so plainly with the plaintiffs, that under that clause of the statute which forbids this court to reverse the judgment of any court unless it shall believe that error has been committed by the court below against the appellant, and materially affecting the merits of the action, we cannot reverse this judgment.

Judgment affirmed. Judges Bay and Dryden concur.

JOSEPH A. EDDY, Plaintiff in error, v. HENRY BALDWIN *et al.*,
Defendants in error.

Evidence.—The testimony admitted upon trial must be relevant to the issues submitted to the jury.

Fraud—Solvency.—The solvency required by law, which will sustain a voluntary deed, consists not only in the present ability of the debtor to pay his debts, but in such a condition of his means that payment can be enforced by process of law.

Error to St. Louis Court of Common Pleas.

The facts are stated sufficiently in the opinion. The following are the instructions given and refused upon the question of solvency :

The plaintiff asked the following instructions, which the court refused :

1. If the jury believe from the evidence that when the deed of Hall to Willi was made, Henry Baldwin was indebted, but that such indebtedness could not be collected by legal process, then they should find that he was then insolvent.

2. If the jury believe from the evidence that at the time the deed of Hall to Willi was made, Henry Baldwin was indebted beyond any means within his personal control to pay, or that, if he had means enough to pay his indebtedness, they were not in such condition that they could be directly taken and appropriated for the payment of such indebtedness under a writ of execution therefor against him, then they should find that he was then insolvent.

3. If the consideration of the deed made from Hall to Willi, dated May 30, 1844, was paid out of money in the possession of or under the control of the wife of Henry Baldwin, as testified to by the witnesses in this case ; if said Henry Baldwin at the time knew of said conveyance, and how the consideration therefor was paid ; if he, at the date of said deed, owed debts, including an indebtedness by him to Beach & Eddy ; if said Baldwin then had not sufficient property or means to pay or satisfy his existing indebtedness, or if his means were

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so managed or disposed of by him, or with his knowledge and consent, that they could not be directly taken and appropriated for the payment of such indebtedness of said Baldwin, under a writ of execution therefor, against him; if said Julia, his wife, at the time said deed from Hall to Willi was made, knew that her said husband was so indebted; if she also knew how and out of what money the consideration of said deed was paid, then the jury should find that said deed was made with intent to defraud or delay the creditors of said Henry, and that said Julia was privy thereto.

4. If the jury believe from the evidence that, at the date of the deed of Hall to Willi, Henry Baldwin had so far given to his wife his means, that at that time an execution against him for such indebtedness as may have been proved then existed, could not be made by taking what means then remained to him, they then should find him insolvent at the date of said deed.

5. If the jury believe from the evidence that, without the money shown to have been in the hands or under the control of Mrs. Baldwin, Mr. Baldwin could not pay his debts at the date of the deed of Hall to Willi, and that the said moneys were intended to be held and controlled by her, with his consent, for her own use as against him and his creditors, except so far as she should consent, then they should find that he was insolvent at the date of said deed.

The defendant asked and the court gave the following:

"If the jury shall believe from the evidence in the case that the deed from Hall to Willi was made with the intent to provide out of a part of the means of H. Baldwin a support for his wife Julia, to guard against the future improvidence of her husband; that this was the only intent and purpose in making the deed; that at the time of making said deed H. Baldwin had means and effects over and above the purchase price of a house and lot conveyed by the deed amply sufficient to pay off and discharge all legal debts or liabilities then existing against him, they will find, under the fourth issue, that the said deed was not made with the intent to de-

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fraud or delay the creditors of said Henry Baldwin in obtaining their just demands against him."

Of its own motion, the court gave the following:

"If, at the date of the deed from Hall to Willi, Henry Baldwin had sufficient means either in money or property, or both, in his possession, or subject to his immediate and absolute control, to pay all his debts, he was not at that time insolvent, notwithstanding his means or part of them consisted of monies in his possession or in the possession of his wife, and could not without his consent have been seized or taken by process of law."

A. Todd and *J. M. Krum*, for plaintiff in error.

I. The court admitted for the defence testimony not relevant to the issues, and calculated to mislead the jury.

II. The court erred in its instruction defining insolvency. If when the conveyance was made Baldwin was in debt, and the consideration paid was from his money, and payment of his debts could not be enforced by process of law, then he was insolvent, and the conveyance was fraudulent. (4 Hill, N. Y. 650, 13 Wend. 377.)

Hill and *Burwell*, for defendants in error.

DRYDEN, Judge, delivered the opinion of the court.

This is a suit brought by Eddy against Henry Baldwin, Julia A. Baldwin, his wife, and Samuel Willi, her trustee, for title and possession of a house and lot in the city of St. Louis, conveyed the 30th of May, 1844, by one Hall to Willi, in trust for the sole and separate use of Mrs. Baldwin. The petition charges that at the time of the purchase Henry Baldwin was insolvent, and largely indebted to the late firm of Beach & Eddy, of which plaintiff is survivor; that the purchase price of the premises, three thousand eight hundred and fifty dollars, was paid out of the money of Henry Baldwin, and that the conveyance was made to Willi to defraud the creditors of Henry Baldwin; that since the conveyance to Willi plaintiff had purchased the property, and taken a

* sheriff's deed therefor, at an execution sale on a judgment rendered against Henry Baldwin for the recovery of a debt to Beach & Eddy, subsisting at the time of the conveyance to Willi. After coming in of the answers, the court directed the following issues to be submitted to a jury, viz :

" 1. Whether, when the deed from Hall to Willi was made, the defendant, Henry Baldwin, was insolvent ?

" 2. Whether, when the deed from Hall to Willi was made, Henry Baldwin was indebted to Beach & Eddy, and whether he afterwards became further indebted to them, and whether the judgment against said Henry in favor of Eddy as surviving partner of Beach & Eddy was rendered for such indebtedness ?

" 3. Whether the money for which Hall made the said deed to Willi was the money of the said Henry Baldwin ?

" 4. Whether the said deed from Hall to Willi was made or contrived with the intent to defraud or delay the creditors of said Henry in obtaining their just demands against him, and if so, whether the said Henry and Julia A. Baldwin or either of them were party or privy to said intent, and which of them was party or privy thereto ?"

On the trial of these issues, evidence was given tending to prove that the property of Henry Baldwin, at the time of the purchase of the house and lot, consisted alone of about — dollars, the fruits of Mrs. Baldwin's labors, chiefly in teaching school, and the proceeds of a prize of eight thousand dollars drawn in a lottery a short time before the purchase of the property in question, all claimed and controlled by Mrs. Baldwin, and admitted and treated by Baldwin as her separate property. The evidence also tended to show that at that time Henry Baldwin was indebted to Beach & Eddy in about seven hundred and fourteen dollars for sums of money which in the course of some two or three years before he had embezzled while in their service as book-keeper, and that his peculations continued until the sum he had abstracted amounted in 1848 to about the sum of five thousand eight hundred and eighty-eight dollars. It also appeared that

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about the month of July, 1842, Henry Baldwin applied for and afterwards obtained the benefit of the bankrupt law, but that his indebtedness to said Beach & Eddy was not put in the schedule of debts.

The court admitted the following evidence at the instance of the defendants against the objections of the plaintiff:—Mr. Willi being interrogated as to the habits of industry and economy of Mrs. Baldwin, said, "Julia A. Baldwin was always very attentive while serving as a teacher in the public schools; witness was then a member of the Board of Public Schools; witness always considered her economical in her expenditures; she occupied one of the class rooms in the public school house, about fifteen feet square, for which she paid no rent; she is smart, intelligent, and capable of transacting business; orders for her wages were drawn in her favor." Defendant then asked the witness this question: "Are you able to state whether it was necessary for her to use exertions to support herself?" To which the witness answered: "that from what he knew of her circumstances he supposed it was at that time necessary for Mrs. Baldwin to exert herself for her support; any woman having a husband like Mr. Baldwin must exert herself to get a support." Mr. Hall being interrogated as to the habits of Henry Baldwin, against the objection of plaintiff, said: "He (Baldwin) was in the habit of getting drunk, and witness tried to persuade him to do better; Baldwin was a very foolish man when drunk; I saw him drunk once when he had money, scattering it around; Mrs. Baldwin had no confidence in Henry Baldwin; I have heard her beg him to reform, often with tears; sometimes she would say, in heart-broken tones 'I must give him up;' but then she would add: 'but he is my poor husband; I cannot give him up. You are a dear good man, and your only fault is drink.'"

The court then refused the instructions asked by the plaintiff as to what constitutes insolvency, and gave one on the subject of its own motion, and plaintiff excepted.

The jury then found the first and fourth issues in the neg-

ative, and the second and third in the affirmative. Plaintiff moved for a new trial, but it was overruled and he excepted. The court on the final trial adopted the finding of the jury and dismissed the petition. Plaintiff asked the court to reverse its finding, which was refused and the plaintiff excepted, and has brought the case here by writ of error.

1. The testimony, the admission of which the plaintiff objected to, did not bear upon any issue submitted to the jury, and was therefore irrelevant; not only so, but from the peculiar features of the case it was well calculated to mislead the mind and improperly sway the feelings of the jury, and ought not to have been admitted.

2. The second question relates to the instruction given and those refused, as to what constitutes *solvency*. The law as given by the court on this subject is, that solvency consists alone of the *present ability* of the debtor to pay, without regard to the efficiency or inefficiency of legal process to compel payment. Abstractly considered, this definition of solvency is very well; but when applied to cases of the sort under consideration, we think it does not come up to the measure of the law. The law is practical and looks to the attainment of practical results; and a solvency which it cannot employ in the payment of the debt of an unwilling debtor, is certainly not distinguishable by any valuable difference from insolvency. The term *solvency* in its application to cases like this, implies as well the present ability of the debtor to pay out of his estate all his debts, as also such attitude of his property as that it may be reached and subjected by process of law, without his consent, to the payment of such debts.

For these reasons, the judgment of the Common Pleas is reversed and the cause remanded; the other judges concurring.

CHARLES L. BOISLINIERE, Coroner of St. Louis County, v. THE
BOARD OF COUNTY COMMISSIONERS.

Coroner.—The object of a coroner's inquest is to ascertain the cause of the death. The authority of the coroner, in this branch of his office, is necessarily judicial in its character. Being the sole judge as to the propriety or necessity of holding the inquest, his action in that respect is not subject to revision by the county commissioners; and he is entitled to fees under the statute notwithstanding the verdict of the coroner's jury discloses that the deceased died of a natural death, and not by casualty or violence.*

Petition of Coroner of St. Louis County for mandamus.

Agreed case:

"Whereas, Louis C. Boisliniere, coroner of St. Louis county, is about to present to the honorable the Supreme Court of the State of Missouri a petition praying that a writ of mandamus may issue from said court, directed to the county commissioners of said county, commanding them to allow certain items in the bill of said coroner against said county, a true copy of which is hereto annexed; and whereas, said items, having been approved by the auditor of said county, were disallowed and rejected by said commissioners on the ground that the verdict of the jury, in each several inquest for which said charge was made, showed that the deceased died of a natural death, and not by casualty or violent death; and whereas, both said coroner and said county commissioners are desirous that the question really at issue should be fairly presented to said Supreme Court for decision on its merits; now, it is hereby agreed that every item in the account has been rejected by said Board of County Commissioners, and disallowed by them, after approval by the auditor, upon the ground that said coroner is entitled to fees only in those cases in which the deceased is supposed to have died from casualty or violence, or where the body of any person coming to his death has been discovered in the county, and not in cases of natural death; and that it does not sufficiently

* This case was decided at the March term, 1861, but was omitted in the cases of that term.

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appear from the verdict of the jury in the several cases mentioned above, and in the account presented by the coroner that the deceased died a natural death, that those cases are within the statute, so as to authorize the coroner to charge therefor.

“And it is further agreed, that if said Supreme Court decide that the coroner is entitled to his fees for service actually rendered in each of said cases, irrespective of the character of the verdict of the jury therein or the circumstances attending the death, a peremptory mandamus may issue commanding us, the said Board of County Commissioners, to allow said items of said account in so far as the specific charges therein are in conformity with the fees allowed by statute; the said Board of County Commissioners reserving to themselves the right to strike out, in whole or in part, any specific charge in the items of said account which in their opinion is not allowed to said coroner by statute.

HAMILTON, *for Petitioner.*

S. H. GARDNER, *for County of St. Louis.”*

Hamilton, for petitioner.

The object of a coroner's inquest is to ascertain the cause of the death. In such matters, the powers and duties of the coroner are necessarily judicial. He, therefore, is not required to satisfy the commissioners that he exercised a proper discretion, or that the case was of such character as rendered an inquest necessary. It will be presumed that he acted within his sphere of duty. The mere fact that the verdict of the jury disclosed a natural death, does not show an improper exercise or abuse of his authority. The circumstances under which the body is found may furnish as strong grounds for suspecting criminal agency in a case where such is the verdict, as in those instances in which the verdict is that the death was caused by violence or casualty. It belongs to the coroner exclusively to determine as to the expediency or necessity of holding the inquest. Any objections of mere form in the statement or certificate could have been obviated. Nothing of the kind entered into the action of the commis-

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sioners. (See Coroner's Act, R. C. 1855, p. 368, "Inquests"; R. C. p. 859, 4 inst. 271; 2 Hale, 65; Giles v. Brown, 1 Mills' C. Rep. 113.)

S. H. Gardner, for Board of Commissioners.

It is only in case of death by violence or casualty, or where the body is discovered under such circumstances as reasonably to lead to the conclusion that the death was occasioned by violence or accident, and not from natural causes, that the county is chargeable with the costs of an inquest. (R. C. p. 368, § 4.) As the statute does not require an inquest to be held, in allowing fees for such service, especially where the verdict of the jury shows a natural death, the coroner should make it appear to the satisfaction of the commissioners that the circumstances surrounding the death were of such a nature as rendered the inquest proper if not necessary. The coroner's certificate did not conform to the requisites of the statute. (R. C. p. 859.)

EWING, Judge, delivered the opinion of the court.

This is a petition for mandamus to the County Commissioners of St. Louis county, requiring them to allow certain items in an account claimed to be due the petitioner, who is the coroner of said county, as fees of office.

From the facts agreed upon, it appears the items were approved by the auditor, but disallowed by the commissioners, upon the ground that the coroner is entitled to fees only in those cases in which the deceased is supposed to have died by casualty or violence, or where the body of any person coming to his death has been discovered in the county, and not in cases of natural death; and that it does not sufficiently appear from the verdict of the jury in the several cases mentioned in the account presented by the coroner, (stating that the deceased died of a natural death,) that those cases were within the statute, so as to authorize the coroner to charge therefor.

By statute it is made the duty of the coroner, as soon as he shall be notified of the dead body of any person supposed to have come to his death by violence or casualty, found within

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his county, to make out his warrant, directed to the constable, &c. (Inquests, R. C. p. 859.) He shall take inquests of violent and casual deaths happening in the county, or where the body of any person coming to his death shall be discovered in his county. (Coroner's Act, R. C. p. 368.)

The object of an inquest, of course, is to ascertain the cause of death—whether it was the result of violence or criminal agency; and in order to attain this object, the coroner is necessarily clothed with a discretion on the performance of his duties. The authority of a coroner in this branch of his office is necessarily judicial in its character; (4th Inst. 271; Hale, 65; Giles v. Brown, 1 Mills' C. Rep., 113;) and the obvious importance of this office to the criminal justice of the county must consist, in a great measure, in the discretion with which he exercises its functions in a judicial capacity. To maintain, as does the counsel for the commissioners, that an inquest should be held only in cases of death by violence or casualty, assumes the existence of the fact which can only be determined, in many instances, by such inquests. How is the coroner to be guided in exercising his jurisdiction in a given case? and when is it properly invoked in acting in this capacity? There is not (nor could there be in the nature of things) any *classification of circumstances by law* circumscribing his action, or fixing precisely the limits of his authority. The nature of his duties and the object to be attained must guide his discretion, acting, as we must presume he does, under a sense of his obligations as an officer and the sanction of an oath. When called upon to act, he will decline or proceed to the investigation accordingly as the circumstances of the particular case are, or are not, of such a suspicious character as to render proper an official examination, and of these he is the sole judge. But if he act, and the result shows the death to have been caused neither by violence, nor to have been the result of casualty, it does not follow that the inquest was improper, or that his authority was illegally exercised or abused; for the circumstances in this class of cases may furnish no stronger grounds for sup-

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posing criminal agency than in cases where the verdict of the jury may disclose a natural death. The law has imposed no limits on the discretion of the coroner, by means of any preliminary inquiry or otherwise, for the purpose of restricting his action in making inquests; and when he acts, the presumption is he has acted in proper cases.

There is manifestly nothing in the statute to warrant the commissioners to revise the action of the coroner, or that gives them a discretion in respect to his fees. The coroner is only to present to the court a certified statement of the costs and expenses of the inquests, including his own fees, fees of jurors and witnesses, constable, and others entitled thereto, for which the county is liable; and it is the duty of the court (or commissioners) to allow the same, and order a warrant to be drawn upon the treasury. (Inquests, § 20.) They pass upon the account for no other purpose than to determine whether the specific charges therein are in conformity with the statute—not to determine whether the inquest was held in a proper case, or that the discretion of the coroner was or was not well exercised. No facts are before the commissioners by which they are to judge of this, and it is not the duty of the coroner to present them.

Let the mandamus go.

THE STATE OF MISSOURI, *ex rel.* WILLIAM G. McILHANY, &C.,
v. ELIAS C. STEWART *et al.**

Quo Warranto.—The Supreme Court has jurisdiction of informations in the nature of a *quo warranto*; but the granting leave to file the information at the relation of a private person, depends upon the sound discretion of the court under the circumstances of the case. Where the attorney general files an information *ex officio*, it is not necessary for him to obtain leave of the court. The parties having an ample remedy in the Circuit Court, involving no difficulties, and the Supreme Court being chiefly an appellate tribunal, it refused to allow an information to be filed to inquire into the title of the relator to act as a director of the St. Charles branch of the Southern Bank. (R. C. 1855, p. 1308.)

* This case was decided at the March term, 1861, but was not reported with the cases of that term.

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Application for leave to file an information in the nature of a quo warranto.

Attorney General, with *Wood & Hunton*, for relators.

E. A. Lewis, and *Lackland, Cline & Jamison*, for respondent.

NAPTON, Judge, delivered the opinion of the court.

This is an application for leave to file an information in the nature of a *quo warranto*.

The information proposed to be filed and acted on states, that at an election of directors of the St. Charles branch of the Southern Bank of St. Louis, on the 11th March, 1861, the relators were duly elected, and afterwards took the oaths and qualified, according to law, for the performance of the duties of such directors; that the defendants, who were also voted for as directors, but who did not receive a majority of the votes cast, have usurped the office of directors, and are now illegally exercising the duties thereof. A judgment of *ouster* is prayed.

Without expressing any opinion upon the merits of the application, a summons was ordered to notify the defendants, with the understanding that the court, upon the coming in of the defendants, would pass upon the questions involved in the motion.

Upon the return of the summons, a motion was made to quash the return, and upon this motion the subject has been discussed generally on both sides. The question is, has this court jurisdiction? and if it has, ought leave to be granted?

The jurisdiction of this court in writs of *quo warranto*, and information in the nature of *quo warranto*, is almost entirely a new question in this court. It is true that as early as 1834 this court exercised jurisdiction in a case where an information was filed against a person who was alleged to have usurped illegally the office of mayor of St. Louis (see *State v. Merry*, 3 Mo. 278); and at a subsequent period, in the case of the *State v. McBride* (4 Mo. 302), the right of a circuit judge to his seat on the bench was heard and determined in

this court, on a similar information. But in the first case there was no examination of the question, so far as the report shows; and the original papers, now on file, do not show what the character of the information was—whether it was filed by the attorney for the State on his own motion, or was an information in his name at the relation of another. In the case of Judge McBride, there seems to have been no question made of the jurisdiction of the court. So, at the last term of this court, we decided a case which was submitted upon an agreed state of facts. And in the case of the State v. Perpetual Insurance Company (8 Mo. 330), the subject was alluded to, but nothing determined in relation to the questions now involved; nor was it necessary that they should be settled.

A writ of *quo warranto* was an original writ out of chancery, directing the sheriff to summon the defendant to appear before the king, or his justices itinerant, when they should come into the county, and show by what warrant he claimed the franchise mentioned in the writ. This writ became obsolete in England with the cessation of the circuits of justices in eyre, and informations were substituted in its stead. These informations were criminal in their form and origin, but have long since been substantially and essentially civil proceedings.

There are in England three distinct classes of informations in the nature of a *quo warranto*: First, those filed by the attorney general, without leave of the court and without any relators; second, those filed with the leave of the court, by the clerk of the crown, by virtue of his common law power; and third, informations by the clerk of the crown, on the relation of some one, and by leave of the court, under the statute of 9 Anne, c. 20.

The information filed in this case falls within the last mentioned class. The name of the attorney general is substituted for that of the clerk of the crown office in England; but, in all other respects, the proceeding is one identical in form and purpose with that which is regulated, if not originated, by the statute of Anne.

State, *ex rel.* McIlhany, v. Stewart.

The statute of Anne has never been in force here, nor has the statute of 4 and 5 W. & M. c. 18, which first imposed some restrictions upon the power of the clerk of the crown in filing these informations on the suggestion of private persons, by prohibiting them from being filed without an express order from the Court of King's Bench.

The statute of Anne has, however, been in substance enacted in this State as early as 1825, but the jurisdiction conferred and regulated by it is exclusively confined to the Circuit Courts. The statute seems to be designed, like the New York statute, of which it is essentially a copy, to cover the whole ground of informations in the nature of a *quo warranto*, where leave of the court was requisite. It is more comprehensive than the statute of Anne, which was confined to officers of municipal corporations, and embraces *all officers and franchises*.

The constitution has conferred upon this court the power to issue writs of *quo warranto*, and to hear and determine the same. The legislature cannot deprive this court of any jurisdiction conferred on it by the constitution. This court has already determined that the power conferred by the constitution extended as well to informations in the nature of a *quo warranto* as to the original writ, which was known as such in the common law. But it has never been decided, nor do the reports show, that there has ever been any occasion to decide, whether this court would exercise any jurisdiction over that class of informations which fall within our statute, and which even at common law required leave from the court, nor under what circumstances, if jurisdiction was entertained, leave would be granted.

Where the attorney general files an information *ex officio*, it is not necessary for him to obtain the leave of the court. But informations at the relation of private persons, whether under the statute of Anne or under our statute, or exhibited as at the common law, can be filed only by leave of the court. The information is not granted as of course, but depends upon the sound discretion of the court under the circumstances of the case.

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One of the circumstances that in England and in this country materially influence the exercise of this discretion, is the absence or existence of any other remedy; and there are other circumstances, not merely growing out of the nature of the office or franchise and the position of the parties, plaintiffs and defendants, but depending on the powers and peculiar jurisdiction of the courts to which the application is made, which will influence the result of the application.

In the case of the Commonwealth v. Smith (4 Binn. 117), the Supreme Court of Pennsylvania, although invested with original jurisdiction generally, refused to entertain a motion for leave to file an information in the nature of a *quo warranto* at Pittsburgh, because it had no power to try issues in fact in that district. The C. J. (Tilghman) said: "The advocates for the motion say that we ought to proceed until we meet with this impediment; that very probably no issue in fact will arise; and that, if it should, it is time enough to stop when we come to it. To this mode of reasoning I cannot accede. It behooves the court to look to their first step, or they may find themselves placed in a very undignified situation. I cannot consent to institute a proceeding of which I do not clearly see the end, in which the defendant may baffle us at his pleasure, by insisting on an issue in fact which it is not in our power to try." Judge Gentz observed, on the same case: "It is admitted that the information prayed for in this case is grantable or refusible, according to the sound discretion of this court; and also that, in the course of inquiry, an issue in fact may eventually demand a trial by jury. If such may be the result, and reasonable doubts may occur whether we possess jurisdiction to try the issue in fact, we should be placed in an awkward situation by making a plunge and finding ourselves in circumstances at last that we must make a retrograde movement."

There is no doubt that this court is mainly intended by the constitution as an appellate tribunal. In some instances original jurisdiction has been given to it, but chiefly with a view to enable it to exercise more effectually its superintend-

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ing control over inferior courts. Its power in proceedings in *quo warranto* seems to be a departure from the general policy evinced in the construction of the court. Whether this jurisdiction was designed to extend to that class of informations which, under the English statutes, had become essentially civil actions, commenced and conducted in the name of a public officer, but really for the mere ascertainment and settlement of private rights, is a question which might justify some hesitation and consideration, if it were necessary now to determine it. The legislature, it is certain, have furnished this court with none of the machinery for trying issues in fact, and in practice such trials are altogether without precedent. These informations are attended with all the forms and must progress through all the stages incident to any other writ. There are pleas and demurrers, issues in law and in fact, trials by jury, motions for new trials in arrest of judgment, and writs of error. The issue of fact by the common law must be tried in the county where the franchise is situated. (Tancred, p. 3; Ang. & A. on Corp., p. 870, § 762.) If such a proceeding is entertained by this court, it must be conducted solely according to the forms of the common law, for neither the statute of W. & M. nor of Anne is in force here; nor does our own statute apply to the Supreme Court, but is exclusively confined to the Circuit Courts.

In Massachusetts and in Pennsylvania, where we find this jurisdiction exercised by their Supreme Courts, we must bear in mind that those courts are courts of original as well as appellate jurisdiction; and in New York, where their statute, from which ours seems to be in all other respects copied, expressly authorizes the Supreme Court to entertain informations in the nature of a *quo warranto*. And the courts in all of these States are constituted on a system essentially differing from ours.

It is not necessary for this court to determine that we have no power to send an issue to St. Charles county, to be tried by a jury there, or that we cannot order a jury to be sum-

State, *ex rel.* McIlhany, v. Stewart.

moned to our bar here. There may be cases, clearly falling within the constitutional competency of this court, in which the court might find itself compelled to resort to all the powers essential to carry out the duties devolved on it, however inconvenient the exercise of such authority might prove; but where the question of entertaining a motion is one of discretion, as is admitted to be the case now, the considerations to which we have alluded must certainly be entitled to weight. When we consider that the regular business of hearing appeals and writs of error already consumes all the time of this court, and is still greatly in arrears; when we see that the court at this place is now more than three hundred cases behind the docket, it certainly would seem to be unadvisable to invite a new class of cases, hitherto unprecedented, and for the determination of which elsewhere ample provision has been made by the legislature. If parties were remediless without the interposition of this court, and the jurisdiction of the court was beyond dispute, it would be the duty of this court, notwithstanding the difficulties and embarrassments occasioned by the want of legislation, to proceed to a determination of the cause; but there is no question of the jurisdiction of the Circuit Court of St. Charles county. The parties have an ample remedy furnished by the legislature, involving no difficulties, and attended with no inconvenience to the public business legitimately devolving on this court.

We have therefore concluded that no injustice would be done to the applicants, and the public interest would be best promoted, by refusing to allow the information to be filed.

END OF MARCH TERM.

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CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,
JULY TERM, 1862, AT JEFFERSON CITY.

STATE, TO USE OF ROBERT E. BEAZLEY, Defendant in Error, v.
WILLIAM W. BLUNDIN *et al.*, Plaintiffs in Error.

Lien of Execution.—Upon the receipt of an execution by the officer, the lien of the writ attaches to the personal property of the defendant, and a levy and sale will pass the title notwithstanding a transfer by the judgment debtor made after such receipt. The lien attaches in the same manner to property acquired by the debtor after the execution comes into the hands of the officer. (R. C. 1855, p. 964.)

Error to Saline Circuit Court.

Shackelford & Turner, for defendant in error.

I. There was no error in giving the instructions asked for by the plaintiff below, or in refusing those asked for by defendants. Snyder being unable, on account of the lien, to make Beazley a title to the horse first swapped to him, Beazley had a right to return the horse and take back his mule—the consideration for which he had parted with the mule having failed. And as, in the mean time, Snyder had swapped

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off the mule, Beazley had a right to ratify the latter swap as if made by himself through his agent, and in lieu of his mule take the horse that Snyder received in exchange for the mule. The lien attached to and continued against the horse originally owned by Beazley, and not the other horse or mule. There was no evidence to warrant the first instruction asked by defendants, there being no evidence that Snyder owned the horse in controversy, apart from the swap, which did not vest such a right in him as to subject the property to the execution. The court was under no obligation to give to the jury the abstract propositions of law asserted in the other instructions asked by defendants, even if they were correct in point of law.

W. T. Crews and S. Boyd, with Bryant, and Ryland & Son, for plaintiffs in error.

I. The executions in the hands of the constable from 7th of May, 1859, the time he first received them, were a lien on all the personal property of Snyder, the defendant in the executions. (R. C. 1855, Executions, § 21, p. 741, and also p. 964, § 5, Justices' Courts, &c. See § 6.)

II. Now Beazley clearly had only Snyder's right to the horse in question, if it was ever Snyder's, while the executions were out against him in Blundin's (the constable) hands; then the horse was subject to these executions, and unless the horse belonged to Snyder before Beazley got him, he, Beazley, acquired no title to him, and could not maintain an action against the constable for selling him.

III. The executions on the judgments in Justice Harris' court, were issued and placed in Blundin's (the constable) hands on 7th May, 1859—the judgments, for various sums, amounting to two hundred and fifty dollars. These executions had some sixty, and some ninety, days to run. These executions were liens on the personal property of Snyder on 7th of May, 1859. On the 9th of May, Beazley swaps his mule to Snyder for Snyder's horse. On the 10th of same month, Beazley returns to Snyder to get his mule back, but

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Snyder had swapped the mule for another horse, and Beazley gets this horse from Snyder by swapping back the horse to Snyder which he first got from him in the swap of his mule. Now, it is most obvious that Beazley must affirm the trade which Snyder had made with Aikman, otherwise Snyder has no title to the horse which he got of Aikman; and if Snyder had none, then Beazley got none from him. But Snyder did have title to the mule he first got of Beazley, and did afterwards have title to the horse he got from Aikman for the mule; and if, at any time during the existence of these executions he was the owner of the mule and of the horse he got for the mule from Aikman, then the executions were a lien on said mule and said horse, and the constable is not liable for seizing and selling them under said executions.

DRYDEN, Judge, delivered the opinion of the court.

This was an action brought by Beazley, in the name of the State, against Blundin and his securities on his official bond as constable of a township in Saline county. Blundin, as constable, had in his hands an execution issued by a justice of the peace against one Snyder. At the time Blundin received the execution, Snyder owned and was in possession of a horse, which, in a day or two afterwards, he swapped to Beazley for Beazley's mule. The next day, Beazley, learning there were executions in the hands of the constable against Snyder, went to Snyder to effect a rescission of the contract of the previous day; but, in the mean time, Snyder had parted with the mule in exchange for the horse of one Aikman, and thereupon Beazley exchanged with Snyder the horse he had got from the latter in the first instance for the horse which Snyder had got from Aikman. Afterwards, and while the execution was still in force, Blundin levied the same on the horse in the hands of Beazley which he last received from Snyder, and sold the same under the execution. To recover damages for levying upon and selling said horse, this suit was brought. The plaintiff recovered judgment in the Circuit Court, which the defendants are seeking to re-

Everett v. Taylor.

verse in this court. The only point in the case arises upon the instructions.

The court instructed the jury to the effect that the horse was not subject to the execution, and refused those of the defendants taking the opposite ground. We think the property was subject to the lien of the execution, and was properly seized and sold.

"The officer receiving such execution shall endorse thereon the time of the receipt of the same; and the execution, from the time of the delivery to the constable, shall be a lien on the slaves, goods, chattels, and shares in stocks of the defendant, found within the limits within which the constable, or other public officer, can execute the process." (R. C. 1855, p. 964, § 5; *Brown v. Burrus*, 8 Mo. 26; *Orchard v. Williamson*, 6 J. J. Marshall, 558.)

The court erred in the matter of the instructions, and its judgment is therefore reversed; the other judges concurring.

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PETER EVERETT, Defendant in Error, v. J. T. TAYLOR, Plaintiff in Error.

Practice—Non-suit.—Where a suit had been submitted to referees, who made a report to which the plaintiff filed exceptions, which the court neither allowed nor overruled, it was no error to permit the plaintiff to become nonsuited, no judgment upon the report having been rendered. (R. C. 1855, p. 1269, § 46, and R. C. 201, § 42.)

Error to Pettis Circuit Court.

Smith, for plaintiff in error.

I. The only question presented by the record for the decision of this court, is, whether or not the Circuit Court of Pettis county erred in permitting the defendant in error, Everett, to take a non-suit.

The exceptions of Everett to the report of the referees, and his prayer that said report be set aside and vacated, and the subsequent action of the court refusing the prayer to vacate

said report, seems to be a clear submission of the case to the court; and, not only that, but said refusal is in the nature of a verdict for the defendant, and it only remained for judgment to be entered. (1 R. C. 1855, p. 201, § 42.)

II. A reference of the case, and a submission to said referees, put it out of the power of the plaintiff to take a non-suit.

Sec. 42, above referred to, shows that if the report of the referees is confirmed, or, which is the same thing, if the exceptions are overruled, the case then stands just as though a jury had rendered a verdict, which is always too late to take a non-suit. (R. C. 1855, p. 1238, § 44—p. 1269, § 48; Keithley v. May, 29 Mo. 220.)

III. "No dismissal of a party ought to be allowed when it will produce any damage in the rights of the defendants, deprive them of a legal defence, or subject them to increased difficulties or liabilities." (Browning v. Chrisman, 30 Mo. 353.)

BATES, Judge, delivered the opinion of the court.

This suit was brought for the settlement of a partnership account. The case was referred to commissioners to ascertain and state the accounts between the parties. The commissioners reported, and the plaintiff filed exceptions to the report, with a motion to vacate and set aside the report. The court refused to vacate and set aside the report; but the report does not show either that the exceptions were allowed or refused, or that the report was confirmed, and the report itself is not contained in the transcript of the record filed in this court.

Afterwards, it appears by the record that the cause was submitted to the court, and the plaintiff asked the court to declare that the report should not be confirmed, and that the exceptions to the report should be allowed, which declaration the court refused to make; and the plaintiff then asked leave to take a non-suit, to which the defendant objected. The court permitted the plaintiff to take a non-suit, to which the defendant excepted and brings the case up by writ of error.

City of Independence v. Moore.

The defendant had before then filed a motion for judgment on the report, which does not appear to have been acted on. The only question is, did the court err in permitting the plaintiff to take a non-suit? The 48th sec. of the 10th art. of the act to regulate practice in the courts of justices (R. C., p. 1269), provides that "no plaintiff shall suffer a non-suit, or dismissal, after the cause, upon a hearing of the parties, shall have been finally submitted to a jury or to the court for their decision." No express provision is made for the cases in which the facts are tried by referees. Section 42, of the act concerning arbitrations and references (R. C., p. 201), provides that "if exceptions (to the report of referees) are allowed, the matter may again be referred, with instructions if necessary; but, if the report is confirmed by the court, the judgment shall be rendered thereon in the same manner, and with like effect, as upon a special verdict." In this case, the exceptions were refused, but the report was not confirmed. It did not, therefore, stand in the same condition as if a special verdict had been rendered, and certainly had not been finally submitted to the court for decision, and there was no error in that respect in permitting the plaintiff to take a non-suit. The report not being in the record, it cannot be seen whether the defendant had any affirmative claims, the enforcement of which would be hindered by suffering the plaintiff to take a non-suit; and it cannot, therefore, be seen that the court exercised its discretion unwisely in permitting a non-suit to be taken.

The judgment of the court below is affirmed. Judges Bay and Dryden concur.

CITY OF INDEPENDENCE, Appellant, v. LAMBERT MOORE, Respondent.

Corporation, Municipal.—The City of Independence has, by virtue of its charter, authority to provide by ordinance for the punishment of offences against the peace of the city, and for the offence of attempting to rescue a prisoner from the custody of its officers. (Acts, 1853, p. 64.)

Appeal from the Probate and Common Pleas Court of Jackson County.

Comingo, for appellant.

I. Appellant contends that the offence with which appellee is charged is not "infamous," which can only be punished on presentment or indictment; (Cons. U. S., art. 5, Amendments;) but may be punished in a summary manner, if the legislature so directs. The 14th sec. of art. 13, of Constitution of Missouri, has direct reference to the general laws of the State, and comes within the principles in the case of *The State v. Ledford*, (2 Mo., t. p. 75,) which decides that while an offence is indictable, as were breaches of the peace by the laws of 1825, it could not be punished in a summary manner, as was sometimes done under the law of 1825, until the decision of the case of *The State v. Stein*, (2 Mo., t. p. 56.)

II. Appellant had implied, if not express power in her charter, to pass this ordinance on the subject of resisting officers. (Session Acts 1853, p. 64.) Section 11th of that act gives the city power, by ordinance, "to prevent riots and disturbances of the citizens;" "to regulate the police of the city;" "to pass all ordinances that may become necessary to carry any provision of this charter into effect; and, also, to pass any ordinance usual or necessary for the well-being of the inhabitants, as granted to any other incorporated city in this State." (*City of St. Louis v. Bentz*, 11 Mo. 61.)

The ordinance under which said Moore was arrested is not unconstitutional nor inconsistent with the laws of the land; therefore, courts should carry it into effect.

In the case of *The City of St. Louis v. Cafferata* (24 Mo. 94), the defendant was guilty of an indictable offence under sec. 34 and 35 of art. 8 of "Crimes and Punishments," (R. C. 1845, p. 405,) and yet the city of St. Louis has the power to punish by ordinance the same offence, although her power to do so under charter is *implied*.

III. Said Moore is not amenable to the laws of the State for resisting, or rescuing a person from, the night watch of

Independence, because said night watch were not acting as "ministerial officers" within the intendment of sec. 19 and 31, R. C. 1855, pp. 603, 605.

John W. Henry, for respondent.

I. The offence for which the defendant was prosecuted by the City of Independence, before her mayor, was an indictable offence; and,

II. The legislature has not given, and, without enacting that the offence should no longer be indictable, could not give to the City of Independence power to pass the ordinance under which the defendant was prosecuted.

In support of the first proposition, he relies upon the 19th, 26th and 31st sections of the 5th article of the act concerning "Crimes and Punishments." The night watch are ministerial officers; so that the defendant's offence is embraced by the 19th section; and, whether ministerial officers or not, they were persons "who had the lawful charge of the prisoner," and the defendant might have been indicted under the 26th and 31st sections.

To sustain the second proposition, he relies upon the 14th sec. of the 13th art. of the Constitution of Missouri, which provides that "no person can, for any indictable offence, be proceeded against, criminally, by information, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger, or by leave of the court for oppression or misdemeanor in office."

An information is defined to be "a declaration, or statement, without being made on the oath of the grand jury, whereby a person is charged with the breach of some public law, or penal statute." (State v. Ledford, 3 Mo. 77.)

In the case of the State of Missouri v. Stein, (2 Mo. 56,) it was decided that the act of the 19th February, 1825, giving justices of the peace jurisdiction of assaults and batteries was unconstitutional and void, because, in the opinion of the court, in conflict with the 5th art. of the amendments to the Federal Constitution, providing that "no person shall be

deprived of life, liberty, or property, without due process of law;" and to the 9th sec. of the 13th art. of our State Constitution, providing that "the accused cannot be deprived of life, liberty, or property, but by the judgment of his peers, or the law of the land;" and that the words "by the judgment of his peers," or "the law of the land," meant by indictment or presentment of a grand jury. (*State v. Ledford*, 3 Mo. 75. See, also, *Jefferson City v. Courtmire*, 9 Mo. 692; *City of St. Louis v. Bentz*, 11 Mo. 61; *City of St. Louis v. Cafferatta*, 24 Mo. 94; *State v. Spear*, 6 Mo. 644.)

BAY, Judge, delivered the opinion of the court.

The complaint in this case charges the defendant with attempting to rescue one John Pansa from the custody of the marshal of the city of Independence, acting as night watch, and was framed under an ordinance of said city, which reads as follows:

"When any person shall be under arrest, or in the custody of the marshal or any of the city watch, or when the marshal or any of the city watch shall be endeavoring to arrest any person by virtue of any warrant or authority vested by law, if any person shall interpose to rescue such person from the custody of said officers, or to prevent such officers, or either of them, from apprehending or arresting such person, the person so interposing shall be punished by a fine of not less than twenty-five nor more than one hundred dollars, or by imprisonment in the city prison for a period not less than one nor more than six months, or by both such fine and imprisonment."

The defendant was convicted, and fined in the sum of twenty-five dollars; whereupon he took an appeal to the Probate and Common Pleas Court of Jackson county, where, on his motion, the complaint was dismissed, upon the ground that the board of councilmen of said city had no power to pass the ordinance in question. The 11th section of the charter of said city provides, among other things, that the mayor and board of councilmen shall have power, by ordi-

nance, "to prevent riots and disturbances of the citizens; to regulate the police of the city, and to impose fines, forfeitures and penalties for the breach of any ordinance," and to pass any ordinance usual or necessary for the well-being of the inhabitants, as granted to every other incorporated city in this State.

That the ordinance recited comes within the scope of the power thus conferred by charter, admits of no doubt whatever. It is not only a necessary but indispensable power for every municipal corporation, for, without it, the corporation would be powerless to preserve peace and good order within its limits. The objection, founded upon the supposed unconstitutionality of the ordinance, is, in our judgment, without any force.

As the court below committed error in dismissing the complaint, its judgment will be reversed and the cause remanded; the other judges concurring.



ROBERT J. PARISH, Plaintiff in Error, v. E. M. FRAMPTON *et al.*,
Defendants in Error.

Witness—Assignor.—An assignor of a chose in action is not a competent witness for the assignee to prove facts about the claim which occurred anterior to the assignment. (R. C. 1855, p. 1577, § 3.)

Error to Cooper Circuit Court.

Stephens & Vest, for plaintiff in error.

1. The court below erred in not allowing the exception of plaintiff in error to the ruling of the commissioner, which excluded the evidence of Stephens as to facts occurring anterior to his assignment to Frampton. (See § 3 p. 1577, R. C. 1855.) Stephens was a competent witness, independently of the assignment. But he could certainly testify as to half the amount sued for. The reason of the statute, as provided in section 6, same page of the Statutes, and which is re-

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lied on by defendant, does not apply to one half of the debt. Parish could certainly recover that of Frampton, and no evidence given by Stephens could change his (Stephens') liability for the amount paid. (See *Lee et al. v. Murray*, 12 Mo. 280, particularly Judge Scott's opinion.)

II. The court erred in not allowing the other exceptions of plaintiff, and setting aside the commissioner's report. The facts show that Parish's money went to pay Frampton's debts, and that too at his request.

BATES, Judge, delivered the opinion of the court.

Stephens and Frampton were partners in business before and to March, 1857, under the name of Stephens & Frampton. The firm name was then changed to J. L. Stephens & Co., and they continued partners till June 1st, 1857, when their copartnership was dissolved, and Stephens and the plaintiff, Parish, formed a copartnership.

In March, 1857, when Stephens & Frampton changed the name of their firm, Frampton told Stephens to pay off the old debts, and they would afterwards settle. While Stephens and Parish were partners, Stephens paid debts of the firm of Stephens & Frampton with moneys of the firm of Stephens & Parish.

In September, 1858, Stephens assigned his interest in the several firms of which he had been a member to Parish, the plaintiff, who brought this suit against Stephens & Frampton for the recovery of the money so paid by Stephens out of the funds of Stephens & Parish, in satisfaction of the debts of Stephens & Frampton.

Stephens did not answer. Frampton answered, and made issues upon several allegations of the petition. The court referred the decision of the issues to a referee, who reported that there was no evidence that Frampton ever undertook to pay these sums to Stephens & Parish, or that he combined with Stephens to take money from Stephens & Parish and appropriate it to the use of Stephens & Frampton. He also reported that an inference even was not warranted that

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Frampton, on settlement, would be indebted to Stephens in any amount. During the hearing before the referee, the plaintiff offered to prove by Stephens certain facts about the accounts sued for, which occurred prior to the execution of the assignment by him to the plaintiff; which evidence the referee rejected, and that rejection is assigned for error.

The 6th section of the act concerning witnesses (R. C. p. 1577) provides that any assignor of an account, judgment, or thing in action, shall be incompetent to testify concerning facts occurring anterior to the assignment.

Whilst there may be some exceptions of persons, who, at first view, appear to be comprehended by the statute, this case is not one of them, and the court committed no error in excluding the testimony offered.

No other error appearing in the record, the judgment of the court below will be affirmed. Judges Bay and Dryden concur.



SHEELEY, Plaintiff in error, v. WIGGS *et al.*, Defendants in error.

Constable—Jurisdiction.—The County Court has no power to vacate the office of a constable, nor any general power to do such acts as shall cause his office to become vacant. Neither has it power, by virtue of the statute relating to constables, (R. C. 1855, p. 346, § 3,) to require the constable to give a new bond, because the penalty in the bond previously given was, in the estimation of the court, insufficient. Where, therefore, the County Court, without a notice to show cause, made an order requiring the constable to give a new bond with a larger penalty than his original bond, and subsequently declared his office vacant upon his failure so to do, and a new constable was appointed by the justice of the township, who gave bond; *held*, that the acts of the County Court were void, and that the securities upon the original bond were liable for moneys collected by the constable upon executions after such acts. Although the court, at a subsequent term, revoked its order, and the constable gave an additional bond, the original bond was not discharged by virtue of 4th section of the statute.

Error to Callaway Circuit Court.

Hockaday & Hayden, for plaintiffs in error.

I. Admitting that the proceedings in the County Court

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were in all respects legal and proper, the evidence showed that Minor was constable *de facto*. That from his election, in 1858, to the expiration of his term of office, in 1860, he was in the actual and notorious exercise of his office, and had never been ousted therefrom. The order of the County Court declaring the office vacant did not oust him from the office, which could be done only by *quo warranto*. "When an officer is sued for malfeasance in office, it is enough to show that he is an officer *de facto*; his not being so *de jure* is not an objection that can be made available to defeat, or in any manner affect, the interests of third persons." "If the law holds the officer liable, there is no principle on which his securities can be discharged." (State, to the use of Moutrey's administrator v. Muir, 20 Mo. 303; St. Louis County v. Sparks, 10 Mo. 117; 3 Johns. 431; 7 Johns. 549; Cowan & Hill's Notes, 555; 9 Wend. 17; 3 Scam. 483; 4 Tenn. 366; 1 Pick. 273; 4 Mass. 60; 7 Mass. 123; 11 Mass. 207; 15 Mass. 200; 13 Mass. 295; 24 Wend. 525; 6 Wend. 422; 9 Johnson, 135; 1 Hill, 674; 5 Hill, 616; 3 Littell, 458; 3 Littell, 316.)

II. But Minor, the constable, was not only an officer *de facto*, but an officer *de jure*, in the lawful, notorious and exclusive exercise of its duties; had been elected regularly, and had, in compliance with the law, given a bond, with the defendants as his securities, for the faithful discharge of such duties. It is urged, however, that the County Court divested him of his office, for that they did on the 6th day of February, 1860, in an ex parte proceeding, without any previous notice, order him to give a new bond in the sum of ten thousand dollars by 11 o'clock on the 8th day of February following, giving him, excluding the day on which the order was made, one entire day to give the new bond, and *duly served* a copy of the order upon him upon the day the order was made. He told them by his letter, carefully preserved among the records of the court, that he was not prepared to give a bond in the sum of ten thousand dollars upon so short a notice, to say nothing of the fact that no legal inquiry had been insti-

tuted, according to the usual forms of law, to discover whether the bond already given was not sufficient to cover executions "soon to come" to his hands. The office is thereupon declared vacant, and on the 11th day of February, 1860, an appointment was made to fill the vacancy. On the 21st day of February the court rescinded the order declaring the office vacant, and Minor filed an *additional* bond. He did not give additional security, but filed an *additional bond*, which meant simply a bond *in addition to the one already given*, so as to cover *the excess* of executions which might come to his hands, the evident intention being to *enlarge the penalty* by an additional bond, and not to substitute the new bond for the former bond and discharge the old bond. This appears the more evident from the fact that the old bond was in a penalty of five thousand dollars and the new bond in a like penalty, making in total the sum required, ten thousand dollars. To place any other construction upon the order would stultify the whole proceeding; because to substitute a new bond with the same penalty with the old bond, as there was no pretence that the securities on the old bond were not perfectly solvent, would not have attained the object which the County Court desired to arrive at, *i. e.* to so enlarge the penalty as to cover executions "soon to come" to the hands of the officer. If the object had been to discharge the old bond by taking the new, none of the proceedings show a conformity to either section of the statute upon which it is supposed the proceedings were based. (1 R. C., title Constables, § 3 & 4; 2 R. C., title Securities, § 23 & 24.) Both of these summary proceedings contemplate a case where the securities, or some one of them, in an official bond, have become non-resident, insolvent, or insufficient, and not to a case where the securities, being solvent and unobjectionable, the penalty of the bond is not large enough to cover anticipated liabilities which may possibly accrue. The penalty of the old bond was not large enough, the order says, to secure such amounts as were "soon" to come to the hands of the constable, and they did accept from him, on the 21st of Febru-

ary, a bond to cover the excess, not as a *new bond*, upon the filing and approval of which the old bond was to be discharged, and upon which the entire liability of the officer to the community should rest, but as an *additional bond*. The statute under which the proceedings were had contemplated that notice should be served upon the constable before the day set for hearing, to show cause why he should not be required to give a new bond. By a proceeding *inverso ordine* they first make the order and then notify him of what they had done, and give him, by the most favorable construction, one day to obey the order, or show cause to the contrary, thereby throwing the burden of proof upon him, to show that he *would not* soon receive executions to a greater amount than the penalty of the old bond. Not being prepared either to prove a negative, or to give so large bond upon so short a notice, his office is declared vacant. A judgment rendered against a party who has no notice of the proceeding is absolutely void. (Anderson v. Brown, 9 Mo. 638; 7 Mo. 463.) This principle applies to the order of February 6, requiring Minor to give a new bond. The order of the 8th of February, to which it is pretended that Minor waived notice by his letter, amounts to nothing, because that order simply declares "the office vacant," a power which the County Court did not possess. The statute gave them no power to declare the *office vacant*, but that vacancy, by the express language of the statute, was simply a consequence which the law annexed to the default of the constable in failing to give a new bond when required by the order of the court to do so. If in no other words, after Minor had written a letter waiving, either expressly or impliedly, the want of notice, and they had at that time ordered him to give a new bond upon a day in such order specified, if he had failed to do so, his office, by force of the positive language of the statute, would have been vacant. This, however, is all based upon the assumption that some of the facts contemplated in the sections of the statute referred to, such as death, insolvency, removal from the State, &c., appeared to the court in order to give jurisdiction; it being a special

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statutory proceeding, and of a summary character, the jurisdiction could not be enlarged so as to include a case like this, not within its purview by even the remotest implication. But, assuming that the court had jurisdiction at a special term of the court, and without notice to Minor, and without any fact appearing as to the sufficiency of the securities of the old bond, as mentioned in the statute, to require a new bond with a larger penalty; if the order was simply irregular, or *a portion* void for want of legal notice, they had power to rescind the order, and they had the power to accept a bond additional to that already given, which it is presumed would be good, independent of any proceedings under the sections referred to of the statute. (Jones v. State, 7 Mo. 85.) Minor never having surrendered his office, the rescission by the court of the order placed him in *statu quo*. And surely the fact whether he held the office legally, or whether W. S. George, the appointee, was entitled to it, could not be made the subject of inquiry in this proceeding. Sufficient to say that the defendants could, at any time, by a proper proceeding under the statute, have discharged themselves from liability, and it is not the fault of plaintiff that they have not done so.

C. H. Hardin, for defendants in error.

I. The County Court of Callaway county had the power, at the special term, to institute proceedings against Minor, constable, and he admitted it by raising no objection on the return of process. Nor can the plaintiff in this collateral proceeding maintain the objection that the court had not the power to act then and in the manner it did. The County Court, when in session, unless restrained by some positive enactment, would have the right to exercise any of its powers not dependent on the consent of another; and the exercise of powers dependent on such consent would be maintained where such consent is given, or, when not given, objection thereto is waived.

II. The sufficiency of the bond was a question alone for the consideration of the County Court, and their act must, from

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the nature of the case, be final. And the office once made vacant by the legal exercise of the proper power, could not be supplied except in the manner provided by law. Hence the act of the court, at a subsequent and different term, rescinding the former order vacating the office of constable, and the subsequent acts of Minor as constable, cannot and do not affect the question. George was the legal appointee to office, and qualified, and gave bond, and obtained an approval thereof by the clerk, before the order of court rescinding the order vacating the office was made. Upon the facts here presented, the securities of Minor, defendants in error, were released, and liability for his acts could not be reimposed on them except by their own consent. (2 R. C 1855, p. 1458, § 23, 24, & 25.)

III. The court below committed no error in granting and refusing instructions, and in overruling plaintiff's motion for a new trial.

BATES, Judge, delivered the opinion of the court.

This is a proceeding against the securities of a constable, who claim that they have been discharged from liability on their bond by the means stated.

In August, 1838, James L. Minor was elected constable of Fulton township, in Callaway county, and the defendants became securities on his official bond. On the 6th day of February, 1860, the County Court of Callaway county made the following order:

"It appearing to the court that the bond of James L. Minor, constable of Fulton township, Callaway county, Mo., is insufficient, from the smallness of the penal sum in said bond, to cover and secure the amount of executions now in his hands, and sure to come to the hands of said constable; it is therefore ordered that said Minor, constable as aforesaid, be, and he is, required to give a new bond in the sum of ten thousand dollars; and it is further ordered, that said constable give said new bond by 11 o'clock A. M., on Wednesday next."

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And on the 8th day of February, 1860, the County Court made the following order :

“The sheriff having returned the notice to James L. Minor, constable of Fulton township, in Callaway county, served, by delivering to said constable a copy of the same, on the 6th day of February, 1860; and the said Minor having failed to show cause why a new bond should not be given; and furthermore, the said Minor having failed to give a new bond, as required by the order of this court, but makes default thereof; it is therefore ordered and adjudged that the office of constable of Fulton township, in said county, in the State of Missouri, is vacant, and that the clerk notify the magistrates of said township of this order.”

Afterwards the justices of the township appointed another person constable, who gave bond, which was approved by the court. At the next term of the County Court an order was made, rescinding the orders of the 6th and 8th of February, and Minor gave an additional bond in the penal sum of five thousand dollars, with other securities, which was approved by the County Court. Minor continued to act as constable until the expiration of the term for which he was originally elected. And the matters, on account of which this proceeding was instituted, took place after all the action of the County Court above stated.

The court below held, in effect, that the securities in the first bond were discharged from liability, by reason of the vacating of the office of Minor by the County Court, and the appointment of another constable in his place. That decision we are now called to review. The third section of the act concerning constables, R. C. of 1855, p. 346, provides that, “whenver any surety of a constable shall die, remove from the county in which he executed the bond, or become insolvent; or when, from any other cause, the County Court shall have reason to believe that the sureties to a constable’s bond are likely to become, or have become, insufficient, the court shall require the constable, at a time to be appointed, to show cause why a new bond shall not be given; and, unless such

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cause be shown, the constable shall be required, within a given time, to enter into a new bond ; and, in default thereof, the office shall be vacant, which shall be filled as other vacancies." The fourth section provides that, "after the approval of such new bond by the court, the sureties of the former bond shall be discharged from all liabilities that may thereafter accrue."

The County Court has no power to vacate the office of a constable, and no general power to do such acts as shall cause his office to become vacant. The statute above quoted gives to the County Court the only power it possesses in the premises, and the law must be strictly pursued, in order to make the exercise of the power there granted effectual. The orders of the County Court, copied above, do not pursue the law. The law declares that the court shall require the constable to show cause why a new bond shall not be given. This was not done at all ; but the first thing done by the court was to require the new bond, and that not for the reason that the sureties in the old bond were dead, removed, or insufficient, but because the penal sum named in the bond was too small. This order was unauthorized by the law, and void. The order of the 8th of February, declaring the office of the constable vacant, was also void, because the County Court has no power to make it. It might make orders which, if not obeyed by the constable, would create a vacancy, but has no power to judge of or declare the vacancy.

As the orders were nullities, the giving of the new bond by the constable was merely voluntary, and does not discharge the securities in the original bond.

The judgment of the court below is reversed, and cause remanded. Judges Bay and Dryden concur.



ZADOCK HOOK, ADMINISTRATOR OF MCCLURE, Respondent, v.
JAMES L. CRAIGHEAD, Appellant.

Equity—Mistake.—A court of equity will reform an instrument which, by reason of a mistake, fails to execute the intention of the parties, as well upon an equitable defence set up in an answer, as in a suit brought directly for that purpose. (*Leitensdorfer v. Delphy*, 15 Mo. 160. Affirmed.)

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*Appeal from Callaway Circuit Court.**H. C. Hayden*, for appellant.

There is but one point presented by the record for the opinion of this court: Whether a mistake in a title bond for the conveyance of real estate can be reformed and corrected, and a specific execution be decreed of the contract so reformed? The point, however, which is attempted to be raised by the motion, is: Whether parol evidence can be admitted to prove a variation by mistake in a written contract, required by the statute of frauds to be in writing, when offered by a party seeking a specific execution of the contract? Although this point is not properly raised by motion, as the allegations in the answer might be supported as well by written as oral evidence, yet, as the issue, if the cause is reversed, will be supported by oral testimony, such should be the essential point for adjudication. It is admitted that there seems to be a distinction in the English equity law between the admission of oral testimony, on behalf of a plaintiff seeking to show a mistake, and to have the mistake corrected and specific performance of the contract so reformed, and on behalf of a defendant resisting a specific performance—it being excluded when offered by the plaintiff, and admitted when offered by the defendant. Such is the law as declared in the case of *Wollam v. Hearn*, 7 Vesey, 211; 15 Vesey, 516; 1 Sch. & Lef. 38, 39. This doctrine has not met with approbation in this country. It is condemned by Judge Story, who says that “it is extremely difficult to perceive the principle upon which such decision can be supported consistently with the acknowledged exercise of jurisdiction in the court to reform written contracts and to decree relief therein.” (1 Sto. Eq. § 161; *Keisselbrack v. Livingston*, 4 Johns. Chy. 148; *Gillespie v. Moon*, 2 Johns. Chy. 585 [cited by Gamble, J., in *Leitensdorfer v. Delphy*, 15 Mo. 167]; *Brown v. Lynch*, 1 Paige, 147; 3 Paige, 313; 6 Paige, 347; *Smith v. Greeley*, 14 N. H. 378; *Peterson v. Grover*, 20 Me. 363; *Gouverneur v. Titus*, 1 Edw. 477; *Flagler v. Pleiss*, 3 Rawle, 345; *Wood-*

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son v. Haviland, 18 Conn. 101; Taylor v. Luther, 2 Sumn. 228, cited and approved in Johnson v. Huston, 17 Mo. 61.) In the case of Johnson v. Huston (17 Mo.), the case of Leitsendorfer v. Delphy (15 Mo. 167) is approved, and the following language is used: "A party to an instrument may, by parol evidence, show a mistake, as well when he is a defendant resisting the enforcement of the contract, as in a direct proceeding to reform it and correct the mistake." (17 Mo. 62.) The reason assigned for the distinction between the admission of such evidence on behalf of a defendant resisting a specific performance, and its rejection when offered by a plaintiff seeking it, seems to surrender the entire point in controversy, because in both instances the oral testimony is admitted to vary the contract; and the same policy which would render its admission proper to prevent injustice in the one case, should likewise render it admissible in the other; for, surely, if there is no remedy in equity for a plaintiff standing in such a predicament, there would be none at law, and he would, therefore, be remediless. Such a rule of discrimination in a court of equity, between parties litigant, would subject it to the reproach of partiality, and that justice was not weighed in even scales. It will be observed, also, that the case of Wollam v. Hearn, 7 Vesey, 211, regarded as the leading case on this subject, equally applies to the case of *fraud*.

BATES, Judge, delivered the opinion of the court.

This is a suit originally brought by McClure, in his lifetime, upon a promissory note made by the defendant to the plaintiff's intestate. The defendant, by answer, admitted the execution of the note, upon which some payments had been made, and alleged that the consideration of the note was the purchase by the defendant, from McClure, of a lot in the town of Fulton, for the conveyance of which McClure gave him a title bond, conditioned that the conveyance should be made upon payment of the note; that, by error and mistake, the lot was improperly described in the bond; that he

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had tendered to McClure full payment of the note, and demanded a conveyance of the lot, which had been refused; and that he had paid into court the balance due on the note, subject to the order of the court in this cause; and praying that the mistake in the bond be corrected so as to conform to the contract between him and McClure; that the heirs of McClure be made parties, and that the title to the lot be passed from them, and vested in him, the defendant.

The plaintiff moved that the answer be stricken out, for the reason that it contains no answer to the plaintiff's action. The court sustained the motion, struck out the answer, and gave judgment for plaintiff, from which judgment the defendant appealed to this court.

In the case of *Leitensdorfer v. Delphy*, 15 Mo. 160, it is stated that the power of a court of equity to reform an instrument which, by reason of a mistake, fails to execute the intention of the parties, is unquestionable. In this case the defendant could set up an equitable defence or counter-claim; and the matters shown in the answer are such as, in a separate suit brought by the defendant, would require a court of equity to decree the reformation of the contract, and specific execution and performance of the contract so reformed. No reason is perceived why the court having jurisdiction of the whole subject, should not exercise it so as to do complete justice between the parties and put an end to the litigation.

Judgment reversed and cause remanded. Judges Bay and Dryden concur.

GEORGE HENSON, Defendant in Error, v. ALEXANDER HAMPTON, Plaintiff in Error.

Contract, special.—Where the plaintiff specially contracted with the defendant to serve the defendant for a definite service, at a fixed price, and before the completion of his contract voluntarily and without cause left the employment of the defendant, he can recover nothing for his services. (*Posey v. Garth*, 7 Mo. 96; *Dickson v. Caldwell*, 17 Mo. 575; and *Schnerr v. Lemp*, 19 Mo. 40. Approved.)

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Error to Camden Circuit Court.

Smith, for plaintiff in error.

I. The instruction given to the jury by the court below, at the instance of the plaintiff, is manifestly erroneous. A party cannot abandon at will and pleasure any contract or agreement entered into for rowing or navigating any boat or vessel on the navigable waters in this State, but must specifically perform the same, according to the intent and meaning of such contract or agreement. (R. C. 1855, vol. 1, p. 299, § 1.) The plaintiff's contract with defendant was for a particular service, which the plaintiff failed to perform without being hindered and prevented by the defendant; and the rule of law is, in contracts for services, the performance of the entire term of service is a condition precedent to the right of recovery, unless the contract is abandoned for good cause. (*Posey v. Garth*, 7 Mo. 94; *Schnerr v. Lemp*, 19 Mo. 40.) This principle of law particularly applies to boatmen; otherwise, boats and vessels would constantly be deserted and abandoned by their crews, and thereby subjected to delay and vexatious litigation.

II. The instruction asked by the defendant very properly and correctly embodied the law of the case, for the reasons above set forth; and for the further reason that where there is a special contract to do work, and there is a failure to perform it according to its terms, there can be no recovery, unless prevented from doing so by the act of God or the other party. (*Helm v. Wilson*, 4 Mo. 41.)

DRYDEN, Judge, delivered the opinion of the court.

Henson sued Hampton before a justice of the peace to recover the value of fourteen days' work and labor performed by the former for the latter, on board of a flatboat, during a certain voyage on the Osage river. Henson recovered a judgment before the justice, from which Hampton appealed to the Circuit Court, where a new trial was had, which resulted as below. On the trial in the Circuit Court, the evidence tended to show that the work and labor for which the

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recovery was sought, although done, was performed under a special agreement between the parties, by which Henson was to serve Hampton for the entire voyage, at the price of one dollar per day; but that, before the voyage was completed, Henson, without the consent and against the will of Hampton, quit and abandoned the service without any fault of Hampton. The court instructed the jury, at the instance of Henson, as follows: "Notwithstanding the plaintiff may have engaged for the entire trip, and left without the consent of the defendant, yet if he performed work for defendant which was of any value to the defendant, the plaintiff is entitled to recover the value of said work, subject to a deduction for any damage which defendant has proved resulting from plaintiff's leaving"; and refused the following, asked by Hampton: "If the jury believe from the evidence that the defendant hired the plaintiff to row or navigate defendant's flatboat to the mouth of the Osage river and back to Linn creek, and that plaintiff, without the fault or consent of defendant, left and abandoned said defendant and his boat before the termination of the voyage, the jury will find for the defendant." To the giving of the one instruction and the refusal of the other, Hampton duly excepted. After verdict, the defendant moved for a new trial, based upon the giving and refusal of the instructions, which, being overruled, he brings the case here by writ of error.

The same question is involved in this case as in those of Posey v. Garth, 7 Mo. 96; Dickson v. Caldwell, 17 Mo. 595; and Schnerr v. Lemp, 19 Mo. 40. If the plaintiff's contract was to serve the defendant during the entire voyage at a fixed price, and that, before the termination of the voyage, he, without cause and against the consent of the defendant, abandoned the service, as the evidence tends to prove was the case, he cannot recover for the part performance of the contract; and the Circuit Court therefore erred in giving the instruction asked by Henson, and in refusing the one asked by Hampton.

For this reason, the judgment is reversed and the cause remanded for a new trial; Judges Bates and Bay concurring.

McCLINTOCK *et al.*, Plaintiffs in Error, v. CURD *et al.*, Defendants in Error.

Practice.—In a suit under the statute to test the validity of a will admitted to probate, the party attacking the will holds the affirmative, and is entitled to open and conclude the case. But the Supreme Court will not reverse the judgment of the court below for refusing to the plaintiff such opening and conclusion, unless it appear that manifest injury has been done to the party thereby. (Farrell's Adm'r v. Brennan's Adm'x, ante, p. 328, approved.)

Depositions.—Either party to a suit has the right to read in evidence the depositions taken by the opposite party, if offered at the proper time, without giving previous notice of his intention.

Instructions.—It is error to give instructions to the jury which there is no evidence to support.

Will—Sanity of Testator.—Upon an inquiry as to the sanity of the testator, the proper question to submit to the jury is, "Were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time when he executed the will?"

Error to Callaway Circuit Court.

The facts are sufficiently stated in the opinion. The following instructions given do not appear in the opinion:

By the court:

3. If the jury find that the testator was a young man of weak, disordered intellect; was so impaired and weakened from any cause as to subject him to the dominion, control, or influence of those with whom he lived; and the jury find that they, or any of them, exercised such influence and control over his mind in the disposition of his property as to destroy his liberty and free will, and cause it to be made to suit their wishes, and not his, this is such an undue influence as will invalidate the will of the testator, and the verdict should be against the will.

Asked by defendant:

1. Before the jury can find that the will of Thomas Freeland is invalid by reason of undue influence exercised over the testator Thomas Freeland, they must be satisfied from the evidence that a dominion over the free will of the testator was acquired, destroying his free agency, and constraining

him to do, against his free will, what he was not able, by reason of such influence, to resist; and that their influence was operating upon the testator at the time of the execution of the will.

Asked by plaintiff:

3. If the jury find any evidence of fraud or imposition in procuring the execution of the will, they may consider the dispositions of property actually made in the will, to guide their judgment in making up their verdict.

The following instructions, asked by plaintiff, were refused:

1. A disposing mind and memory is a mind and memory which have the capacity of recollecting, discerning and feeling the relations, connections and obligations of family and blood; and unless the jury find from the evidence that Thomas R. Freeland, at the time of the execution of the will, had such mind and memory, they must find against the will.

2. If the jury find from the evidence that the whole or any part of the will of Thomas R. Freeland was suggested to him by any other person and adopted by him, such adoption must not have been the result of incapacity, weakness of mind, fraud, circumvention, or undue influence; and whether it was so, is for the jury to determine from all the facts and circumstances in the case.

4. To sustain the will, the jury must find it to be the will of Thomas R. Freeland. If it be the will of another, to which he assented from mere habit, and that the habit was produced by prostration of both body and mind, it cannot in any sense of the word be considered as his will, and ought not to be sustained; and of this the jury must judge from all the circumstances in the case.

7. If the jury find from the evidence that Thomas R. Freeland, at the time of the execution of the will, from natural imbecility, disease, or any other cause, was incapable of managing his own affairs, they must find against the will.

8. Should the jury find from the evidence that Thomas R. Freeland, at the time of the execution of the will, had a mind of sufficient sanity for general purposes, and of suffi-

cient soundness and discretion to regulate his affairs in general; yet, if they further find that he was weak in body and mind, and under the dominion or influence of those about him, sufficient to prevent the exercise of such discretion, and that such dominion or influence did prevent the exercise of such discretion in the execution of the will; and of this they must judge from all the circumstances in the case.

Ansell, for plaintiff in error.

I. The court erred in refusing the plaintiffs the opening and closing argument in the cause. (*Taylor v. Wilburn*, 20 Mo. 306.)

1. The burden of proving unsoundness or imbecility of mind in the testator is upon the party impeaching the validity of the will for that cause. (2 Greenl. § 689; 1 Greenl. p. 93, § 78—p. 96, § 81.)

2. The question is not who denies, or who affirms the issue; the burden here is upon the (caveators) plaintiffs. They do not deny the execution of the will, but set up insanity, and such an influence exercised over the mind of the testator as will vitiate the will. (See remarks of Judge Clayton in *Chandler v. Ferris*, 1 Harr. 454, 461.)

3. On a trial where the sanity of the testator is in question, and where parties setting up and insisting on the validity of the will have the opening and closing of the case, they must prove the due execution of the will and the sanity of the testator; but where the parties opposed to the will admit the formal execution of the will, and allege insanity and undue influence, and have the opening and closing of the case, the *onus probandi* falls on them to show the insanity and undue influence over the testator. (Same case.)

4. After the formal proof of the paper, the executor might fold his arms until the plaintiffs produced something to overthrow his case, which is *prima facie* established by the production of the will and the inference of law in favor of sanity. We are of the opinion that the plaintiffs have the open-

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ing and closing. (Clayton, C. J., in Chandler v. Ferris, 1 Harrington, 461.)

5. From the nature of the issue, the *onus probandi* is with the defendants (now plaintiffs). The execution is proved, and the only question is as to the testator's insanity. The law presumes sanity until the contrary is proved. We are of the opinion that the defendants (plaintiffs) have the right to conclude. (*Per curiam*, Bell v. Buckmaster; Chandler v. Ferris, *n.*; 1 Harr. 460.)

II. The court erred in refusing plaintiffs permission to read the deposition of W. H. Russell, which was on file among the papers in the cause, and taken by defendants as evidence in chief, and also parts of it in rebuttal of evidence offered by defendants for the reason given by the court for excluding the same, "that plaintiffs should have given defendants notice of their intention to use it before the trial." (Greene v. Chickering & McRay, 10 Mo. 109.)

III. The first instruction of the court ought not to have been given. It, in effect, tells the jury, that unless he was an idiot, he was competent to make a will; one lingering ray of intellectual light is all that is required.

The second instruction of the court ought not to have been given for the same reason. It is more objectionable than the first.

If there was no evidence offered tending to prove undue influence, the third instruction of the court was unnecessary; but if Russell's deposition had been given in evidence, as it ought to have been, the third instruction would have been properly given.

The fourth instruction of the court may be good law and good doctrine in the lunatic asylum; but it is thought that when a man is proven insane upon one subject, he is not far from the dividing line of sanity and insanity upon all other subjects.

The fifth instruction given by the court is a bird of very equivocal plumage and of doubtful gender, of French origin. The court will not recognize perverted feelings, unaccom-

panied with mental delusion, as constituting insanity, which is nothing more or less than saying that moral insanity is not recognized by law.

IV. The first instruction asked by plaintiffs and refused by the court is undoubtedly law. To say that a disposing mind and memory is anything less than a mind and memory which have the capacity for recollecting, discerning and feeling the relations, connections, and obligations of family and blood, would be to substitute drivelling imbecility in the place of sane and perfect memory, and to confound and obliterate all landmarks between sanity and insanity. (See *Den v. Johnson*, 2 South. 454.)

The seventh instruction asked by plaintiffs was improperly refused by the court. If Thomas R. Freeland, at the time of the execution of the will, was, from imbecility, disease, or any other cause, mentally incapable of managing his own affairs, he was incapable of making a valid will. He ought to have had a disposing memory, so that he was able to make a disposition of his property with understanding and reason; and that is such a memory as the law calls sane and perfect memory. (*Boyd v. Eby*, 8 Watts, Pa., 70; *Davis v. Calvert*, 5 Gill. & John. 269; *Newhouse v. Godwin*, 17 Barb., N. Y., 236.)

Moral insanity accompanied with delusion.—Delusion has generally been laid down as essential to insanity; that is, the fancying things to exist which can have no existence, and are impossible, according to the nature of things—as that trees will walk and statues nod—and which fancy no proof or reasoning will remove. (*Shelford on Lunacy*, 293.)

Whenever a person once conceives something extravagant to exist which still has no existence whatever, and he is incapable of being permanently reasoned out of that conception, he is said to be under a delusion, and delusion in this sense of it, is almost, if not altogether, a convertible term with insanity. (*Den v. Clark*, 5 Halst. 79; *Stanton v. Witherpoon*, 16 Barb., N. Y., 259.)

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C. H. Hardin, for defendant in error.

I. The court properly permitted the defendants to open and close the case. The only issue under the statute being whether the writing was the will of Thomas R. Freeland or not; the question as to proof of insanity or undue influence being simply subordinate inquiries which conduced to prove the issue, "will or no will." (*Cravens v. Faulconer*, 28 Mo. 19; *Withington v. Withington*, 7 Mo. 589; 1 Greenl. Ev. 77; *Hawkins v. Simms*, 13 B. Monroe, 269; 8 Conn. 261; *Brooks v. Barrett*, 7 Pick. 9; 8 Greenl. 42; *Phelps v. Hartwell*, 1 Mass. 71, 73 & *n.*; *Buckminster v. Perry*, 4 Mass. 593; *Riggs v. Wilton*, 13 Ill. 15; *Potts v. House*, 6 Ga. 324; 2 Gray, 524; *Cilley v. Cilley*, 34 Me. 162; *Barry v. Butlin*, 1 Curt. 637; *Harris v. Ingledew*, 3 Peer Wms. 93.) But, assuming even that the court committed error in allowing defendants the opening and conclusion, this court will not reverse for such cause. (*Wade v. Scott*, 7 Mo. 514, 515; *Reichard v. Manhattan Life Ins. Co.*, 31 Mo. 518.)

II. The court committed no error in excluding the deposition of William H. Russell when offered by the plaintiffs after they had closed their case, and the defendants had also closed their evidence in rebuttal. The plaintiffs, of course, had a right to read the deposition at the proper time as part of their case—as their own deposition. (10 Mo. 110; *Young v. Smith*, 25 Mo. 341; *Pearce v. Dansforth*, 13 Mo. 360; *State v. Locke*, 26 Mo. 603; 14 Mo. 348; *Wells v. Sawyer*, 21 Mo. 354.)

III. There was no error in the giving or refusing of instructions, or the refusal to sustain the motion for a new trial. (30 Mo. 191; *Gunsolis v. Gearheart*, 31 Mo. 585.)

BAY, Judge, delivered the opinion of the court.

This was a proceeding under our statute of wills to contest the validity of the will of Thomas R. Freeland, deceased. The petition alleges two grounds upon which the plaintiffs rely to set aside the will. First, that at the time of its execution said Freeland was not of sound and disposing mind.

Second, that the same was obtained by fraud and undue influence exercised upon the mind of said Freeland.

These allegations are traversed by the answer. Upon the trial of the cause, at the April term, 1861, of the Callaway Circuit Court, the jury found the issues for the defendants; whereupon plaintiffs moved for a new trial, which motion was overruled, and the cause is brought here by writ of error.

It is insisted by the plaintiffs that the court below erred in allowing the defendants the opening and closing of the testimony and argument. This point was made in *Farrell v. Brennan et al.*, decided at the last March term of this court, and we held in that case that the *onus* was upon the party attacking the will, and that he was entitled to open and conclude; but as it was a question of practice, we would not reverse for error in the court below relating thereto, unless satisfied that the party had been materially prejudiced by the ruling of the court.

The next ground of error assigned is that the court refused permission to the plaintiff to read in evidence the deposition of William H. Russell, taken in behalf of the defendants, and by them filed in this cause. The offer to read this deposition was not made until after defendants had closed their case in rebuttal, and the court in the exercise of its discretion might have well refused upon this ground; but the reason assigned by the court, as appears from the bill of exceptions, was the omission of plaintiffs to notify defendants, before the trial, of their intention to use the deposition. While we are not disposed to question the action of the court with reference to the mode in which it exercised its discretion, still we must be permitted to say that the reason assigned is both novel and untenable. We know of no law or practice which requires such notice to be given. A deposition taken by one party to a cause may be used by the other, notwithstanding it is not read by him at whose instance it was taken, for, after it is filed in the cause, the parties are equally entitled to the use of it. (*Greene v. Chickering & McKay*, 10 Mo. 109.) But the case in which such notice is required to be given is

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where a party offers to read a deposition taken in a former suit between the same parties. In such a case, this court held, in *Samuel v. Withers*, 16 Mo. 541, that notice of its intended use should be given, or it should be filed anew in the suit, so that the party against whom it was intended to be read may have knowledge thereof. After reading the deposition of Russell, it is difficult to conceive for what purpose it was offered, unless it was to obtain, in anticipation of its exclusion, a technical ground for reversal, for there is nothing in the deposition which could, in the slightest degree, operate to the advantage of the plaintiffs; on the contrary, its tendency is to sustain the will. Russell was the uncle of the testator, and knew him from his infancy. In conversations had with him some years prior to his death, the testator expressed an intention to dispose of his property as the will provides, and Russell thus speaks of his mental condition at that time: "I state, without the slightest qualification, that his mind seemed to be as clear and as capable of comprehending his business affairs as I had ever seen it at any time from its infancy. There was no excitement; nothing was evinced either in manner or expression that made the slightest impression on my mind that he was not just as capable of directing and disposing of his property as any man in the land."

It is, therefore, very evident that the exclusion of this deposition in nowise prejudiced the plaintiffs.

The last ground of error is in reference to the giving and refusal of instructions; and to determine whether the court erred in this respect, it may be well enough to refer to the rule laid down in such cases for the guidance of the jury. In *Harrison v. Rowan*, 3 Wash. C. C., p. 585, Justice Washington, in his charge to the jury, thus speaks of the requisite capacity to make a will:

"He must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged; a recollection

of the property he means to dispose of; of the persons who are the objects of this bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed—the disposition of his property in its simple forms.”

Sergeant, J., in delivering the opinion of the Supreme Court of Pennsylvania, in *Boyd v. Eley*, 8 Watts, 66, says: “The rule of law in regard to wills is, that the memory which the law holds to be a sound memory, is when the testator hath understanding to dispose of his estate with judgment and discretion, which is to be collected from his words, and actions, and behavior at the time.”

Lord Kenyon, in his address to the jury in *Greenwood v. Greenwood*, 3 Curteis, Appendix, remarks: “I take it, a mind and memory competent to dispose of his (the testator’s) property, when it is a little explained, perhaps may stand thus: having that degree of recollection about him that would enable him to look about the property he had to dispose of. If he had a power of summoning up his mind so as to know what his property was, and who those persons were that were the objects of his bounty, then he was competent to make his will.”

Jarman, in his *Treatise on Wills*, vol. 1, p. 51, after referring to the leading cases upon this subject, comes to the conclusion that the question, in its most simple and intelligible form, should be thus stated: “Were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time when he executed his will?”

This, in our opinion, is the best form in which the question can be submitted to a jury; and when the jury shall have heard the opinions of witnesses who have observed the conversation, manner, and deportment of the person whose sanity is in question, but little difficulty will arise in reaching a

just and correct conclusion. But if the court should undertake to enlighten the jury by instructing them with reference to the different phases of insanity, such as moral and intellectual mania, with the divisions and subdivisions adopted by writers on medical jurisprudence, it would only result in confusing their minds and leading them into a field of inquiry wholly unnecessary to an intelligible solution of the question before them. The court should, therefore, submit the question in its most simple form, and avoid, as far as possible, any inquiry not bearing directly upon the issue made by the pleadings. The practice of giving instructions upon abstract propositions of law, in the absence of any testimony to which they can apply, is equally reprehensible. Thus, in the case under consideration, instructions were given with reference to undue influences exercised upon the mind of the testator; yet it is expressly stated in the bill of exceptions that no evidence was offered on either side tending to prove undue influence on the part of any person over the testator. Instructions upon the same subject were asked by plaintiff and refused, and such refusal, notwithstanding the said statement in the bill of exceptions, assigned in this court as error.

The court, upon its own motion, gave the following instruction upon the first issue:

"The petitioners allege that the paper writing purporting to be the last will and testament of Thomas Freeland, in evidence before the jury, is not the last will and testament of the said Freeland, and defendants deny this."

1. The court, upon this issue, directs the jury that if they find from the evidence that the deceased, Thomas Freeland, at the time of executing said paper writing in evidence before them, was of sound mind, they will find for the will; but if they find from the evidence that at the time of the execution of said will the said Thomas Freeland had not mind and memory sufficient to understand and comprehend the nature and character of the business he was engaged in, and the objects of the provisions contained in his will, the jury will find against the will.

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2. Mere weakness or imbecility of mind is not sufficient of itself to set aside a will; but the unsoundness of mind sufficient to invalidate a will should be of such degree as to render the testator for the time being incapable of understanding that he was engaged in making a disposition of his property, and of comprehending the nature and kind of his property, and the persons who were intended to be provided for by his will.

4. If the jury find that the testator was, at the time of the execution of said will, laboring under partial insanity—that is, that he was insane upon one or more subjects, and sane and rational on all others—this will not be sufficient to invalidate his will, unless the jury are satisfied that the will was the direct offspring and result of one or more of the delusions under which the testator was laboring.

5. If the jury find that the testator was, at the time of the execution of the will in evidence, laboring *under moral insanity*, or a perversion of the moral feelings, this cannot affect the validity of the will, unless the jury are satisfied that said moral insanity was accompanied by an insane delusion, and the will was the offspring of said delusion; and unless the jury find that the will was executed under undue influence, as set forth in the third instruction, or they find that the testator, at the time of the making of the will, had not mind and memory enough to know what he was doing, and the effect of the dispositions made by his will, as set forth in the first and third instructions, they will find a verdict for the will.

Defendants' instructions:

1. The jury are bound to presume that Thomas R. Freeland was of sound mind, and capable of disposing of his property by will at the time the will was executed, unless from the evidence in the cause they find that he was insane, and that said will was executed while in that condition.

The plaintiffs then asked the following instructions, to-wit:

5. If the jury find from the evidence that Thomas R. Freeland had not a sound and disposing mind and memory at the time of the execution of the will in controversy, they

must find against the will; and this they must determine from all the circumstances in the case.

6. Although unsoundness of mind or undue influence is not to be presumed, but must be proved, yet direct proof is not required to establish the same; but the jury may arrive at the conclusion that Thomas R. Freeland's mind was unsound, or that he was unduly influenced in making his will, from the facts and circumstances in the case.

9. To sustain the will it is not sufficient that Thomas R. Freeland, at the time of its execution, had sufficient mind and memory to answer familiar questions, but he must have had a disposing mind and memory sufficient to enable him to comprehend and understand the character and amount of his property, and the persons or objects intended to be provided for by his will, and their relations to himself.

10. If the jury find from the evidence that Thomas R. Freeland, prior to the execution of the will, was insane, and incompetent to make a will, the law presumes such insanity and incompetency continued to the time of making the will, unless such insanity and incompetency were accidental and temporary in their nature; and, unless accidental and temporary, the defendants must show sanity and competency at the time of the execution of the will.

Those instructions, taken as a whole, present, in our opinion, the law of the case fairly to the jury. The jury were in effect called upon to say whether, at the time of the execution of the will, said Freeland had a sufficient mind and understanding to dispose of his estate with judgment and discretion. Several of plaintiffs' refused instructions are unobjectionable, but they were substantially given in others. Upon the whole case, we see no such error in the court below as will justify us in disturbing the verdict.

The other judges concurring, the judgment will be affirmed.

MORGAN HARBOR *et al.*, Plaintiffs in Error, v. PACIFIC RAILROAD COMPANY, Defendant in Error.

Practice—Setting aside Judgments.—Where there is any irregularity in the proceedings, a court may, on motion, at a subsequent term, set aside the judgment, or do whatever the justice of the case may require; but where the proceedings are regular, however erroneous, the power of the court to interfere ceases with the term.

Error—Jeofails.—An error in the court in rendering judgment is not cured by the statute of jeofails after the term is passed; it can only be corrected by appeal or writ of error.

Error to Osage Circuit Court.

Parsons, for plaintiffs in error.

The only point in this case, is whether, after the term at which a final judgment is rendered, the court can interfere with it. There was no irregularity in the proceedings in this cause. There was an answer regularly filed in the cause, and the issues tendered by it were presented to the jury on the trial; the answer was read to the jury at the trial. The only objection is the form of the judgment entered, which is only a clerical error not affecting the regularity of the trial or the force of the judgment. (See *Ashby v. Glasgow*, 7 Mo. 320; *Hill v. City of St. Louis*, 20 Mo. 584; *Brewer v. Dinwiddie*, 25 Mo. 351; 13th clause, 19th sec., art. 9 of Prac. Act; also, sec. 20, same Act, p. 1256-7, 2 R. C.)

Plaintiffs therefore insist that the judgments of the court at November term, 1860, setting aside the judgment at November term, 1859, and the judgment of the court dismissing this suit, ought to be reversed and held for naught, and the judgment of November term, 1859, reinstated and affirmed.

Aikman Welch, for respondent.

I. The court did not err in setting aside the final judgment rendered in this cause at its November term, 1859, though the motion to set the same aside was not filed at the same term at which such judgment was rendered. Such

final judgment was wholly irregular and erroneous. It professes to be a judgment by default and confession, for want of answer, and an inquiry of damages at the same term, and that, too, after a sufficient answer had been filed. Such judgment is erroneous. The proceedings were irregular; and the court will, on motion, at a subsequent term—the irregularity being shown to its satisfaction—set the judgment aside, or do whatever the justice of the case may require. (*Brewer v. Dinwiddie*, 25 Mo. 351; *Ashby v. Glasgow*, 7 Mo. 320; *Hunt et al. v. Yeatman*, 3 *Hammond, O.*, 16.)

DRYDEN, Judge, delivered the opinion of the court.

In this case, the plaintiffs sued the respondent for damages occasioned by certain excavations made by the defendant on the lands of the plaintiffs in the construction of its railroad. The petition contains three counts: in one, the damages are held at two hundred and fifty dollars; in another, at one thousand dollars, and in the third, at two thousand dollars. The defendant answered, putting in issue all the material allegations of the petition. The case was continued, from term to term, two successive terms after that at which the answer was filed. At the November term, 1859, the case standing regularly for trial, the court empannelled a jury and proceeded with the trial in the absence of the defendant, who failed to appear. After hearing the evidence offered by the plaintiffs, the jury found a verdict for the plaintiffs for two thousand two hundred and fifty dollars damages, on which the court rendered judgment. The entry of the proceedings of the court on the trial is exceedingly inartificial and informal, partaking of some of the formalities of a judgment by default, and of some of those of a mere inquiry of damages; yet, taking all the record together, it is plain enough that the verdict was made upon a hearing of the evidence and in response to the issues, and that the judgment of the court was based upon the finding of the jury, and not upon the default of the defendant.

At the succeeding term of the court (May, 1860,) the

defendant, by attorney, appeared and filed a motion to set aside the judgment in these words, viz :

"The Pacific Railroad, by their attorney, John D. Stevenson, comes and moves the court to set aside the judgment heretofore rendered in the cause for the following reasons, to-wit:

"Because said judgment is oppressive and excessive, irregular and defective in this: said judgment is a judgment by default, and confession, and assessment of damages, all at the same term, although defendant had regularly filed an answer to the petition, and the cause was regularly at issue upon answer; because said judgment was rendered for a greater amount than the damages claimed by plaintiffs; because said judgment was rendered upon a trial when defendant was not represented by counsel or otherwise, the defendant being absent by a misunderstanding as to the time of the holding of the Circuit Court for Osage county; and the defendant, upon a fair trial, having a meritorious defence to the action; because the jury rendered a verdict for a greater amount than the amount claimed by plaintiffs."

The excuse stated in the motion for the non-appearance of the defendant at the trial term was supported by the affidavit of the attorney.

The court accordingly set the judgment aside, and directed the case to be set down for trial. When the case was afterwards called for trial, the plaintiffs refused to proceed, and thereupon the court dismissed the cause. The plaintiffs took their exceptions, and have brought their case to this court by writ of error.

The only question which it becomes material for us to consider in the case, is as to whether the Circuit Court was warranted in setting aside the judgment after the term at which it was rendered. We think it was not. In the case of *Ashby v. Glasgow and others*, decided by this court, (7 Mo. 320,) Judge Scott, in delivering the opinion of the court, says:

"When a final judgment is rendered in a cause, and that judgment is erroneous, it may, during the term at which it

was rendered, be set aside; for, during a term, all the proceedings are in the breast of the court, and they may be altered or vacated as justice requires. But when the term is past, then the control of the court ceases, and no alteration or amendment can be made but such as is authorized by the statute jeofails and amendments. An error in the court in rendering judgment is not cured by the statute of jeofails; it can only be corrected by appeal or writ of error."

Again, in the case of *Hill v. The City of St. Louis*, (20 Mo. 584,) in which there was a clause inserted in the entry of a judgment to the effect that the defendant had leave, at the next term of the court, to move to set the judgment aside, and accordingly, at the next term, the motion was made and the judgment set aside, it was held by this court that the clause was a nullity, and that the Circuit Court had no authority to interfere with the judgment at any subsequent term; and so the action of the Circuit Court on the motion was set aside, and the original judgment was reinstated by this court. In *Brewer v. Dinwiddie*, 25 Mo. 351, it is said: "Nothing is better settled than that, after the term at which a final judgment is rendered, the court cannot interfere with it."

Where there is any irregularity in the proceedings, the court will, on motion, at a subsequent term, set aside the judgment, or do whatever the justice of the case may require; but, where the proceedings are regular, however erroneous, the power of the court to interfere ceases with the term at which the proceedings are had. In the case under consideration, no irregularity in the proceedings are brought to the notice of the court. The case was regularly for trial, and, so far as we can see, was regularly tried. The awkwardness of the entries of the clerk, and the error of the jury in finding the damages in the aggregate on all the counts in the petition, and not on each count separately, afford no warrant for interference with the judgment after the term. As to the ground in the motion that the defendant's counsel was under a misapprehension as to the time of holding the court, it

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would hardly have furnished a sufficient reason for setting aside the judgment if it had been presented at the term at which the judgment was rendered, but certainly at a subsequent term it was entitled to no consideration. (Field & Cathcart v. Matson, 8 Mo. 686 ; Kirby & Potter v. Chadwell, 10 Mo. 392.)

The judgment of the Circuit Court in setting aside said final judgment is therefore reversed, and the said final judgment is reinstated ; the other judges concurring.



NANCY PHILLIPS, Plaintiff in Error, v. TIMOTHY D. BLISS, Defendant in Error.

Justices' Courts—Appeal.—Upon an appeal from a judgment of a justice, in a suit by attachment, the defendant may, in the Circuit Court, plead in abatement of the attachment, although he may have defended upon the merits before the justice. (R. C. 1855, p. 975.)

Error to Miller Circuit Court.

Smith, for plaintiff in error.

I. That the appearance and pleading to the merits of the action by the respondent here before the justice of the peace, was a complete waiver of the right to a verbal plea in the nature of a plea in abatement. (Vide 17 Mo., Cannon v. McManus, p. 345 & 346 ; also 13 Mo., Joseph Hatrey v. Edward Shuman, p. 547.) And on the trial of the case subsequently in the Circuit Court, it was manifestly an error in the appellate court to permit the verbal plea in abatement to be entered by respondent after his waiver of the same in the court below ; because the case stood for trial *de novo* in the Circuit Court, upon the issues joined in the court below, and none others. (Vide vol. 2 R. C. 1855, p. 975, § 18.) Now if the appellant here had consented to the respondent here entering such verbal plea in abatement in the Circuit Court, on the trial of the cause, (see 1 vol. R. C. p. 267, § 18,) it

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might not have been error in the Circuit Court in so permitting the same; but such plea in the cause was entered by respondent against the consent of this appellant.

BAY, Judge, delivered the opinion of the court.

This was a suit by attachment, brought before a justice of the peace. Judgment being rendered for the plaintiff, the defendant took his appeal to the Circuit Court, where the defendant filed a plea in the nature of a plea in abatement, putting in issue the truth of the affidavit upon which the attachment was predicated. Plaintiff moved to strike out the plea upon the ground that the defendant, by pleading to the merits in the justice's court, had waived his right to plead in abatement; but the court overruled the motion, and this is the only ground of error assigned in this court. If the suit had been instituted in the Circuit Court, and the defendant in his answer had plead both in abatement and in bar to the merits of the action, the plea in bar would undoubtedly have been a waiver of his right to plead in abatement; but, with reference to appeals from justices of the peace, our statute requires that the appellate court shall proceed to hear, try, and determine the same anew. It is true that the cause of action cannot be changed, but the defendant is by no means limited or confined to the same defence set up before the justice. It is a trial *de novo*, and his pleading to the merits before the justice did not waive his right to plead in abatement in the Circuit Court.

Let the judgment be affirmed; the other judges concurring.



ROBINSON *et al.*, Plaintiffs in Error, v. COUNTY COURT OF MORGAN COUNTY *et al.*, Defendants in Error.

Judgment.—The action of the court in sustaining a demurrer to a petition is not a final judgment, so that an appeal or writ of error may be prosecuted upon it.

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Error to Morgan Circuit Court.

Gardenhire, for plaintiffs in error.

I. The 14th section of the act to incorporate the Osage Valley and Southern Kansas Railroad Company (Laws of Mo. 1847, adj. Sess., p. 62) is unconstitutional. It delegates to the County Court, without any restriction or limitation whatever, the absolute authority to confiscate, by the subscription of stock and formal taxation, the entire property of every citizen of the county. The responsibility of the justices of the County Court to the electors is not a limitation affecting the constitutionality of the law. If the subscription had been equal to the entire property of the county, of what account would be such responsibility? The question is one of power, not the probabilities of the abuse of it.

II. If the power given is constitutional, the subscription is such an abuse of it as will authorize an injunction.

III. Section 30 of the act to authorize the formation of railroad associations (1 R. C. 427) is applicable to the Osage Valley and Southern Kansas Railroad Company. (1 R. C. p. 438, § 57.) The County Court could not subscribe stock without submitting the amount proposed to be subscribed to the people. Their decision must be had, and is final. Statutes enacted in favor of corporations, and in derogation of common right, are to be strictly construed. (3 Kelley, 31.) The word "*may*," in the 30th section above quoted, means *must* or *shall*. Public interest and rights are concerned, and the tax-payers have a right *de jure* that the question of subscription shall be submitted to them. (5 Cowen, 188; 9 Porter, 390; 4 Gil. 24.) See also act of Jan. 14, 1860, amending section 30, so as to read "*shall* for information," instead of "*may* for information." (Laws 1859-60, p. 88.) The amendment shows what was originally intended, and was to place the matter beyond *doubt*.

IV. If section 30 of the general railroad law is not peremptory, the County Court, having submitted the question of

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subscription to the people, could not subscribe a larger amount than rejected by their vote.

J. P. Ross, for defendant in error.

I. The refusal of the court to grant an injunction was not a final determination of the cause within the meaning of the statute, consequently a writ of error will not lie.

II. An injunction is not the proper remedy. The threatened injury is not in its nature irreparable. Damages would compensate plaintiffs. (2 Story's Eq. Juris. 260, § 928 and following.)

III. The County Court of Morgan county had, both by the general railroad law and the act incorporating the Osage Valley and Southern Kansas Railroad, the power to subscribe to the capital stock of said road, and to raise the amount subscribed by taxation, or by issuing the bonds of the county. (R. C. 1855, 427, § 30; also Sess. Acts, 1857, p. 63, § 14.) Neither of these acts required the County Court to submit the question to the people. The first says the court may do it; the second is silent upon the subject. It is submitted that, under the law, it was a matter of discretion with the County Court, whether or not they would submit the matter to a vote of the people for information. The act of the 14th January, 1860, (see Sess. Acts, 88,) is a legislative construction of the word *may*, in the above recited act, and shows that the word, as there used, means *may*, and not *must*, as contended for by plaintiff in error. The right of the Legislature, under the constitution, to confer the power here claimed and exercised by the County Court, has been so frequently recognized in the courts, as to leave this point no longer open to argument. It is not perceived how the vote of the tax-payers could affect the question of the *power* of the County Court to subscribe to the capital stock of said road.

There was nothing before the Circuit Court tending to show an abuse of power by the County Court in making the order complained of.

Lessing, Mayer & Co. v. Vertrees.

BAY, Judge, delivered the opinion of the court.

Plaintiff in error filed a petition in the Circuit Court of Morgan county, praying for an injunction to restrain the justices of the County Court of said Morgan county from assessing, levying, or collecting any taxes, or issuing any county bonds, for the purpose of providing for the payment of a subscription, by said justices, for and in behalf of said county, to stock in the Osage Valley and Southern Kansas Railroad Company. At the return term the defendants filed a demurrer to the petition, which, as appears from the bill of exceptions, was sustained by the court, though the record sent here does not show what action was had by the court upon the demurrer. Assuming it, however, to be true that the record of the court contains an entry sustaining the demurrer, still it does not appear that a final judgment has been rendered in the cause, or any judgment whatever, from which an appeal can be taken. There is nothing in the record or bill of exceptions showing that any entry was made in the cause except the one sustaining the demurrer. The suit, therefore, is still pending in the court below. (See *State v. Pepper et al.* 7 Mo. 348.)

With the concurrence of the other judges, the writ of error will be dismissed.



LESSING, MAYER & Co., Plaintiffs in Error, v. JAMES C. VERTREES *et al.*, Defendants in Error.

Administration—Title.—Although the administrator or executor is entitled to the personal effects and choses in action of the decedent, he holds them only as trustee for the creditors and next of kin, and not for his own benefit; therefore the effects of the decedent cannot be seized by a judgment creditor of the administrator in payment of the debt of such administrator. Nor are the payees of a note given to the administrator for goods of the decedent sold by him, liable as garnishees to a judgment creditor as being debtors of such administrator. (The cases of *Lecompte v. Sergeant*, 7 Mo. 351, and *Thomas v. Relfe*, 9 Mo. 377, overruled.)

Lessing, Mayer & Co. v. Vertrees.

Error to Ray Circuit Court.

Henry Binswanger, as administrator of Solomon Binswanger, deceased, had sold the goods of the intestate, and taken in payment the notes of the defendants, Vertrees et al., payable to himself as administrator, and upon such notes, upon default of payment, had obtained judgment. The plaintiffs, having obtained judgment against Henry Binswanger, issued execution and summoned the defendants, Vertrees et al., as garnishees of said Henry. The garnishees answered, setting up the purchase of the goods and giving of the notes to Henry as administrator, and concluded by denial of all indebtedness to said Henry. Issue was taken by the plaintiffs upon the answer, and the facts submitted to the court, which held that the garnishees were not liable as debtors of Henry Binswanger, and gave judgment for said garnishees. From this decision the plaintiffs appealed.

Aikman Welch, for plaintiffs in error.

I. The only question in this case is, where a note is taken by an administrator for goods of his intestate, sold by him, and a suit is afterwards instituted on such note by the administrator in his individual name, and a judgment is recovered in his individual name, whether the judgment debtor in such judgment is subject to garnishment at the instance of an individual creditor of such administrator for the private debt of such administrator.

By the common law, an administrator became the owner of the personal estate of his intestate, and held the legal title thereto. (Com. Dig. 132; Coke Litt. 388; 1 Williams on Exec. 449.) And this must be held to be the law of this State, unless such common law has been changed by statute.

In this State, in *Lacompte v. Sergeant*, 7 Mo. Rep. 351, this is declared to be the law, and the individual debts of the administrator were permitted to be set off against a demand due to the intestate. This doctrine was re-affirmed in this

court in the case of Thomas et al. v. Relfe, adm'r of Hunt, 9 Mo. 373.

If this doctrine shall be held to be correct, it will then follow that the garnishment in this case was well taken, and the judgment of the court below was then clearly erroneous.

II. At common law, the recovery of the personal property of an intestate, in the individual name of the administrator, was a conversion of such property of the intestate, and regarded as a *devastavit*. The property then became the absolute individual property of the administrator, and subject to his debts. (Quick v. Staines, 1 Bos. & Pul. 293; see also Farr. et al. v. Newman et al. 4 T. R. 621; Jones et al. v. McNeill et al. 1 Hill, S. C., 56.)

The administrator is the owner of the personalty of his intestate, and can sell the same without any order of court, and such sale is valid and passes the title.

Although the creditors of an estate might complain of the application of the funds of the estate to the discharge of the debts of the administrator, yet the administrator cannot so complain. (Jones et al. v. McNeill et al. 1 Hill, S. C., 56.)

Ryland & Son, for defendants in error.

I. As to the property in the notes and judgment:

In whom was the property and ownership of the judgment obtained by H. Binswanger on the notes given upon the consideration of the sale, by order of the Probate Court of Clay county, of the goods, wares and merchandise of Solomon Binswanger's estate? We say, emphatically, the property of the estate of Solomon Binswanger, deceased.

Though the words "administrator of A. B.," on the face of the note, may be considered as *descriptio personæ*, and when justice requires it will be thus considered, yet in this case the proof shows that the property sold (the consideration of the notes) was the property of the estate of Solomon Binswanger, and was not Henry's property. The issue was fairly made as to whether the note was evidence of a debt due Henry, or due to Solomon's estate, and the proof is clear that

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it was not to Henry, but to Solomon's estate, the money was coming.

Surely the simple fact that the attorneys for the administrator, bringing the suit on notes which might well be brought as administrator, or as an individual simply, cannot have any such effect as contended for by the plaintiffs in this action. Newlin and others, securities for H. Binswanger, were not willing for him to have the notes; and, when they became due, they, at H. Binswanger's order, brought suit on them for the benefit of the estate, and not as H. Binswanger's own private property. (See 2 R. C. 1855, p. 1462; Farr v. Newman et al., 4 Tenn. 344, t. p.; 8 Mo. 161; 7 Mo. 351.)

BAY, Judge, delivered the opinion of the court.

The question presented for our consideration in this case is, whether the personal property and effects of a decedent, in the hands of his executor or administrator, can be seized by a judgment creditor of such executor or administrator, and applied to the payment of the individual indebtedness of such executor or administrator.

The plaintiff in error contends for the affirmative of this proposition, and relies chiefly upon the decision of the Supreme Court of this State, in *Lecompte v. Sergeant*, 7 Mo. 351, in which Judge Tompkins, in delivering the opinion of the court, said: "No principle of law is more generally acknowledged than that the executor or administrator is, *for every purpose*, the owner of the moneys of his intestate which have come to his hands."

The same doctrine was acquiesced in, in *Thomas v. Relfe*, 9 Mo. 377; but, after a careful examination of the question, we are at a loss to discover any good reason upon which it can be maintained. It is true, that at common law the legal property in the personal estate of the testator vests, on his death, in the executor, and for many purposes may be regarded as the owner. He may, for instance, maintain an action for a wrongful conversion of the property, or for any injury to the property, in his individual name, and for every

purpose necessary to enable him to discharge the duties of his office he is regarded in law as the owner of the property. As a necessary incident to the nature of the office, he has a disposing power over the property; but that he is the owner *for every purpose*, cannot be maintained upon either reason or authority. The only authority cited by Judge Tompkins is *Farr et al. v. Newman et al.*, 4 Durnford & East, 347; but that case, so far from supporting the doctrine contended for, is an authority to the contrary. Ch. J. Kenyon, Justice Grose and Justice Ashhurst, in separate opinions, held that goods of a testator in the hands of his executor could not be seized in execution of a judgment against the executor on his own right. Buller, J., gave a dissenting opinion, and it is this dissenting opinion, and not the opinion of the court, that Judge Tompkins had in view, when writing the opinion in *Lecompte v. Sergeant*. Grose, J., reviewed the question at great length, and thus refers to the rule as contended for by J. Buller:

"The injustice is obvious. It is to make the goods of A. pay the debts of B.; and possibly leave the creditors of A. without any redress but against the person of B. One case of intolerable hardship may be put: Suppose the executor indebted to the crown in more than the value of his own and the testator's personal estate; the moment the executor is invested with his authority, an extent issues and sweeps away every shilling of the testator, in fraud of his creditors, legatees and next of kin! A more shameful act of injustice can hardly exist under the name of law."

Again the learned judge remarks: "Why may not the executor devise the testator's goods; why may not his administrator take them; why are they not forfeited to the crown on attainder; why are they not liable to be seized under a commission of bankruptcy against the executor? The answer and reason is, I think, obvious. It is because they are not *his goods*; he is only the distributor and dispenser of them for the benefit of the creditors, the legatees, and the next of kin, of the testator. To permit him to devise them;

to permit his administrator to take them; to permit the assignees, under a commission against the executor, to seize them; and to permit the sheriff, under an execution issued against his goods, to take them, would be to dispose of them for purposes for which he had them not—in a way in which it cannot by any law be intended that those purposes will be answered.”

In *Howard v. Jemmet*, 3 Burrows, 1368, Lord Mansfield said: “If an executor becomes *bankrupt*, the commissioners cannot seize the specific effects of his testator: not even in money, which specifically can be distinguished and ascertained to belong to such testator, and not to the bankrupt himself.”

In Comyn's Digest, vol. 1, p. 259, it is said, in speaking of the goods of the testator: “Nor shall they be taken in execution for the proper debt of the executor or administrator.”

We think, therefore, that we are justified in saying that Judge Tompkins was mistaken in supposing that either under our law, or the common law, the administrator is the owner, *for every purpose*, of the goods of the intestate.

Suppose an administrator should die before a final settlement, will it be contended that the goods and effects which were in his hands as administrator, will go to his executor or administrator to pay his debts, or to be distributed among his heirs? Certainly not; and why not, if he was, *for every purpose*, the owner of such goods and effects?

But if any doubt can exist as to the rule under the common law, it is very clear that under our statute the administrator is in no sense the unqualified owner of the goods of his intestate. The act defining his duties and powers requires him to give a bond, with two or more sufficient securities; and one of the conditions of the bond is, “that he shall account for, pay, and deliver all money and property of said estate.” He is further required to have the personal property appraised, and to file an inventory of the same, which inventory must be made in the presence of witnesses

appointed for that purpose ; and if he shall open or examine the papers, money, or other property of the deceased, without the publicity and attestation provided in the act, he becomes liable to pay to the persons entitled to the estate a sum not exceeding five thousand dollars. So his duties with respect to the sale and disposition of the personal property are marked out and defined, and penalties are imposed for any neglect of the same. If he shall die or resign, or his letters be revoked, he or his legal representatives must account for, pay and deliver to his successor, or to the surviving or remaining administrator, all money, real and personal property, of any kind, of the deceased ; and the succeeding or remaining administrator is empowered to proceed at law against the delinquent and his securities, or either of them, or against any other person possessed of any part of the estate. He is further required to make annual settlements with the County or Probate Court ; and after a final settlement of the estate, (and sometimes before,) the personal effects remaining in his hands are to be distributed among those entitled thereto, as such court shall order and direct.

These and other provisions of the statute upon the same subject show very conclusively, that, under our system of laws, the administrator is by no means the absolute owner of the goods and effects of the intestate. If the law was otherwise, and such property could be seized for the payment of the individual liabilities of the administrator, it would result most disastrously to creditors, heirs and legatees. They would be wholly remediless ; for it can hardly be contended that the securities in the administration bond would be liable for property thus misappropriated when it becomes the act of the law, and does not result from any negligence or misconduct of the administrator.

The judgment of the court below will be affirmed ; the other judges concurring.

Morgan v. Martien.

CALVIN MORGAN, Plaintiff in Error, v. JAMES M. MARTIEN,
Defendant in Error.

Surety.—Although the contract into which the security has entered cannot be varied without his assent by any agreement between the creditor and principal debtor, yet the creditor may properly take additional securities from the principal, not changing the terms of but collateral to the original contract. Where, therefore, the defendant had become security upon notes given in consideration of lands sold to the principal, and the principal subsequently executed a deed of trust to secure payment of the same notes, which deed contained a proviso that in case of default for thirty days in the payment of any one of the notes, all the notes should become due and payable, and that the trustees might proceed to sell the lands and pay all of said notes, whether due on their face or not. *Held*, 1. That by the terms of the deed the notes became due only so far as to authorize a payment from the proceeds of sale, and that no suit could be prosecuted upon them until they matured. 2. That the taking of such deed of trust operated to the benefit of the security, and did not change the effect of his contract.

Error to Callaway Circuit Court.

This suit was instituted in the Callaway Circuit Court against defendant in error, on a note, dated May 23, 1857, payable two years after date, for four hundred and fifty-two dollars and fifty cents, with interest from date till due at six per centum, and after due ten per centum. Defendant executed the note as security to Joseph G. Martien, as to whom the suit was dismissed for want of service of writ. Defendant, James M. Martien, put in an answer averring his release from all liability, upon the following statement of facts: That on the 23d day of May, 1857, Joseph G. Martien bought of William T. Christy and Calvin Morgan, owners in joint interest—the former three fourths and the latter one fourth—of about fifteen hundred acres of land in Audrain county, for about nineteen thousand dollars; nine thousand of it paid in hand, the balance on time, secured by promissory notes as follows: seven notes were given to Christy and seven to Morgan, embracing their respective interests in the unpaid purchase money. Joseph G. Martien, with defendant in error as his security, gave two notes to Morgan, one to be due in one year, and the other in two years, which latter note is the one

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in suit, and like notes in time he gave to Christy, with the same security. The other ten notes, falling due at later periods, were given by Joseph G. Martien alone. On the 23d day of June, 1857, Christy and wife executed to Joseph G. Martien a deed in fee simple to his interest in the lands, which was acknowledged the 6th of July, 1857, and filed for record the 16th of July, 1857. That on the 23d of June, 1857, Morgan and wife executed to Joseph G. Martien a like deed, which was acknowledged the 1st of July, 1857, and recorded at the time of the other deed. That on the 23d of May, 1857, Joseph G. Martien and wife executed to certain trustees a deed of trust to said lands to secure the payment of said notes upon this condition: "If any one of said notes become due and remain for thirty days unpaid after due, then, by virtue of such default in the payment of any of the said notes, all the notes remaining unpaid shall forthwith become due and payable, as though due by the face thereof; and if said notes or either of them shall become due by their tenor, or the provisions of this trust, and be unpaid, then this deed shall remain in full force," and the said trustees may proceed to sell, for cash in hand, on the terms and conditions as expressed in the deed of trust. This deed of trust was acknowledged 9th of June, 1857, and filed for record at the same date as the other deeds. Defendant in error, by his answer, claimed there was a change of contract to his prejudice and without his knowledge or consent; denied any consent to the execution of the deed of trust, by which the contract embraced in the note sued on was changed, and desired to be released from all liability for the same.

The trial was had before a jury, whose verdict was for the defendant in error.

The evidence adduced tended to show that James M. Martien was present at negotiation of a sale of the lands by Morgan and Christy to his brother, Joseph G. Martien, and that he was cognizant of and assented to the giving and taking of the deed of trust.

C. H. Hardin, for plaintiff in error.

I. The object of the provision in the deed of trust making certain notes mature upon the contingency expressed, was to enable the trustees to sell the property upon the happening of such contingency. The provision effected no other purpose, nor did it contemplate any change or alteration of the contract as contained in the several notes themselves. It applied alone to the powers of the trustees, and not to the duration of the notes as notes. It provided for accelerated remedies against the specific property of the purchaser, and not for a disturbance of the particular contract as contained in the several notes. It neither extinguished nor suspended any remedy the plaintiff had on the note sued on, against either obligor. He could not have sued either obligor till the maturity of the note, as expressed by the note itself. If this be true, there was no variation of the note in the time of its maturity. Plaintiff could not, upon the supposed change and alteration of the rate of interest, as alleged to have been effected by the deed of trust, have recovered ten per cent. interest from the expiration of thirty days next succeeding the maturity of the first note, instead of interest according to the terms of the note sued on in this cause. If this be true, there was no variation of the note in the rate of interest. If, then, the plaintiff could not have sued on the note in this cause earlier than the date of its maturity as expressed in the note, nor recovered greater interest than as therein expressed, no alteration of the terms of the note was had, and no rights or remedies of the surety were prejudiced.

II. The deed of trust did not, though a specialty, extinguish or suspend any right of action the obligee had on the note, or the obligors thereof, nor any remedy or right accorded by law to the surety. There is not a covenant in it that will bear the construction that it does. On the contrary, it expressly acknowledges, by its reference to the existence of such notes, that plaintiff holds certain securities on the obligors separate and apart from it. The law provides for collateral security, a principle as firmly fixed as any.

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When taken, shall it be construed to have extinguished the original debt without an admitted agreement between the parties to that effect, or some well-defined act leading to this conclusion and none other? The deed of trust does not stipulate to be, nor does it in law operate as, a satisfaction of the notes, nor does it disable plaintiff from suing on them any more than if it had not been taken. If it can be collected from the deed of trust that it was the intention of the parties thereto, that the notes should continue an existing security, and that the deed of trust should be a further, or collateral, security, the surety is not discharged. (Pittman on Principal and Surety, 200-3, and the authorities there cited; Ireland v. Beresford, 6 Dow. 233; 2 Story on Cont., 428-9; Twopenny v. Young, 5 Dow. & Ry. 259; same case, 3 B. & C. 208; Emes v. Widdowson, 4 Car. & Payne, 151; Price v. Edmonds, 10. B. & C. 578; Hulme v. Coles, 2 Sim. 12; Gorden v. Calvert, 4 Rus. Ch. 581; 5 Howard, Miss., 631; 3 Binney, 520; 5 Barbour, S. Ct. 408-9; 11 Wend. 320-1.)

III. If these conclusions be correct, the court committed error in overruling plaintiff's demurrer, in its rulings as to giving and refusing instructions, and in not granting to plaintiff a new trial.

A new trial should have been granted, as the verdict is unsupported by any evidence at all. If the deed of trust varied the terms of the contract, it was with the entire consent of the defendant in error. He was an active party in, and listener to, the whole land transaction, which took several days to accomplish; heard and joined in all the discussions; read and handled all the papers, including the deed of trust, and signed a part of them; and subsequently, after re-examining, at his own residence, the deed of trust as often as twice, he gave a written authority for the notes in which he was surety, the note in suit being one, to be given up to the proper owners. These facts allow but one conclusion, that defendant in error consented to all the stipulations in the deed of trust. (5 Robinson, 252-3; 1 La. An. R. 254.)

Ansell, for defendant in error.

I. The court did right in refusing to set aside the verdict and judgment in this cause, and in not granting a new trial on the motion of plaintiff, and in overruling said motion.

In *Miller v. Stewart*, Judge Story says: Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract; to the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound and no further. It is not sufficient that he may sustain no injury by a change in the contract, and that it may even be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal. (*Miller v. Stewart*, 9 Wheat. 680, 702; 5 Cond. R. 728.) The surety is discharged if, without his consent, the principal parties make a new agreement inconsistent with the terms of the original agreement, or if they agree to make any alteration either in the terms of the original agreement, or in the mode of performing them. (Theobald on Principal and Surety, p. 76, § 152.) In *Writcher v. Hall*, 5 B. & C., 269, Mr. Justice Bayley said: "The new agreement was binding only on those persons who were parties to it. If it had been intended to bind the surety by it, he should have been consulted—he had a right to insist upon a literal performance of the original bargain. If a new bargain was made, he had a right to exercise his judgment whether he would become a party to it." (5 B. & C. 269; *Writcher v. Hall*, Theobald, 76-7, § 152; 2 Madd. 221; Theobald 77, § 153; 3 Price, 214; Theobald, 78, § 155.)

The real and only question in this case is, whether the surety was, in point of fact, placed in a different situation by what had taken place on the arrangement between the principal and the obligee, and whether by such change of situa-

tion *he might have been prejudiced*—not whether he did in fact actually sustain any injury in consequence.

A creditor taking a surety is bound to notice the nature of his agreement, and to protect him. I am not at liberty, in such a case, to inquire whether any inconvenience did actually arise to the plaintiff in consequence of the agreement between Moore and sheriff; for if the plaintiff was discharged, *he was discharged at the time when the agreement was entered into between them.* (7 Price, 223; Theo. 79, § 155; 17 Johns. R. 384; 2 Johns. Chy. 554; 8 Pickering, 458, 130; 10 Johns. R. 180; 8 Bingham, 156; 2 B. & C. 61; 3 Bos. & Pul. 366; 3 Kent's Com. 124; Story's Eq. § 567, 638, 639; 8 Pickering, 500; 2 Johns. Chy. 554; 2 Story's Eq. 671, &c., § 1224, 1225, 1226, and notes at the bottom of pages 671 to 681, both inclusive.)

BAY, Judge, delivered the opinion of the court.

The only question presented by the record in this case is whether the acceptance by plaintiff of the deed of trust so changed, altered or modified the original contract as to release the surety.

The general rule of law as extracted from English authorities is, that any variation in the agreement to which the surety has subscribed, which is made without his knowledge or consent, and which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, will discharge the surety.

The rule is fully recognized by American authorities, and is thus stated by Story, in his work on Contracts, vol. 1, p. 428: "The liability of a surety cannot be extended beyond the actual terms of his engagement. Whenever, therefore, he fairly assumes a liability, it may be extinguished by any act or omission of the guarantee which alters the terms of the contract, unless it be with his consent. Nor does it matter that such an alteration be for the benefit of the guarantor; because he has a right to stand upon the very terms of his agreement."

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Thus no principle is better settled than that if the creditor, without the consent of the surety, agree to give time to the principal debtor, the surety is thereby discharged; and the reason of this doctrine is obvious enough, for by giving time to the debtor, the remedy of the surety against the principal is postponed, and becomes more uncertain and precarious.

The right of the surety, therefore, to stand upon the terms of the original agreement is clear and undoubted. Now, the question to be determined in this case is, whether the deed of trust changes or alters the original contract, or whether it is a new and additional security, and therefore collateral, and in no sense affecting the rights of the parties in reference to the original contract. The deed bears even date with the note sued on, but was not executed until some time in June following. It conveys to the trustees of plaintiff and one William T. Christy, a large tract of land in Audrain county, to secure the payment of certain notes therein mentioned, including the note in controversy, and it provides that if any one of the notes shall become due and remain unpaid for thirty days, then all of said notes shall become due and payable, and the trustees, or the survivor or survivors of them, may proceed to sell the property therein conveyed at public auction, &c., and out of the proceeds of such sale shall pay said notes or either of them, whether by their face they become due or not. There is no clause or covenant in the deed from which it can be inferred that the parties intended that it should operate as an extinguishment of the original contract, or should in anywise enlarge or diminish the liability of either party to such original contract. On the contrary, it is manifest that the deed was merely collateral, and intended as an additional and further security. So far from affecting the rights or remedies of the surety, it enures to his benefit. The object of the provision in the deed making certain notes mature upon the contingency expressed, was to enable the trustees to sell the property upon such con-

tingency, and apply the proceeds, or so much thereof as might be necessary, to the liquidation of all the notes whether upon their face they had matured or not. It was to insure the prompt performance of the original contract, and not to change or alter it. It was to enable the trustees to apply the proceeds of the sale to the payment of the entire debt instead of a part. The notes could not, by the happening of such contingency, mature for general purposes, and hence the plaintiff could not have brought suit upon this note prior to its maturity, as expressed on its face. We are therefore disposed to regard the deed as merely collateral and furnishing new and additional security for the performance of the contract; and the doctrine is well recognized, that the taking of such additional security without agreeing to give time to the debtor, will not discharge the surety. (2 Story on Cont. 429; Pittman on Principal and Surety, 202-3; *Emes v. Widdowson*, 4 Car. & Payne, 151.)

Emes v. Widdowson was an action of assumpsit on two bills of exchange. The defendant conveyed certain property as security for sums of money then due, and also for all future demands. The assignment contained a power of sale, but not to be executed until after six months' notice. The notice had not been given, and the defence proceeded upon the ground that the personal remedy was suspended. Tindall, C. J., held, however, that the assignment could only be considered as collateral security, and that the personal remedy was not suspended, there being no clause in the deed to that effect. See also *Gahr v. Niemcewicz*, 11 Wendell, 322, and the authorities there cited.

The reason of the rule above referred to certainly does not exist in this case. The defendant has been deprived of no remedy against the principal, and the taking of the deed was greatly to his advantage. He cannot, therefore, claim a release upon any legal or equitable ground.

The judgment will be reversed and the cause remanded; the other judges concurring.

Christy v. Martien.—Freeman v. Henry County.

WILLIAM T. CHRISTY, Defendant in Error, v. JAMES M. MARTIEN, Plaintiff in Error.

Error to Callaway Circuit Court.

C. H. Hardin, for defendant in error.

Thomas Ansell, for plaintiff in error.

BAY, Judge, delivered the opinion of the court.

For the reasons given in the case of Morgan v. Martien, just decided by this court, the judgment in this case will be affirmed.



THOMAS W. FREEMAN, Plaintiff in Error, v. HENRY COUNTY, Defendant in Error.

Fees, Circuit Attorney.—The circuit attorney, for prosecuting or defending suits for or against one of the counties of his circuit, is entitled to no greater compensation than that allowed by the statute. (R. C. 1855, p. 756, § 2, and p. 275, § 13.)

Error to Henry Circuit Court.

Welch, attorney general, for defendant in error.

I. The plaintiff is expressly required by law to prosecute all civil actions in which any county in his circuit may be concerned, and to defend all suits brought against any county in his circuit. (1 R. C. 1855, p. 275, § 13.) The fee law provides for the payment of his fee for such services (1 R. C. 1855, p. 756, § 2), and by the forty-second section a penalty is prescribed for demanding or receiving a greater fee than is allowed by the act.

II. The court did not err in the giving or refusing instructions.

DRYDEN, Judge, delivered the opinion of the court.

The plaintiff, while circuit attorney of the judicial circuit

White, Adm'r of Dickerson, v. Gray.

in which Henry county was comprised, as the attorney of the defendant, prosecuted one suit brought by the county, and defended another brought against it, in the Circuit Court, and has instituted this proceeding to recover the reasonable value of his services in the two suits. The Circuit Court decided that he was not entitled to recover on the ground that the services were performed in the discharge of his official duties as circuit attorney, for which compensation was prescribed by statute in the form of fees.

The decision of the Circuit Court was clearly right. The fifteenth section of the act of 1855, defining the duties of circuit attorneys, (R. C. 1855, p. 275,) provides: "The circuit attorney shall reside in his circuit, and commence and prosecute all civil and criminal actions in which the State or any county in his circuit may be concerned; defend all suits brought against the State or any county in his circuit," &c.

The fee law of 1855 (R. C. 1855, p. 756) provides: "Sec. 2. Circuit attorneys shall be allowed fees as follows, unless in cases where it is otherwise directed by law—for his services in all actions which it is, or shall be made, his duty by law to prosecute or defend, four dollars."

The other judges concurring, the judgment of the Circuit Court is affirmed.



GEORGE T. WHITE, ADMINISTRATOR OF DICKERSON, Defendant
in Error, v. J. P. H. GRAY *et al.*, Plaintiffs in Error.

Instruction.—The Supreme Court will not decide upon the sufficiency of the evidence to warrant an instruction unless all the evidence be preserved in the bill of exceptions.

Issues.—The jury are properly instructed to disregard all evidence not pertinent to the issues presented by the pleadings.

Error to Moniteau Circuit Court.

This was a suit commenced in the Moniteau Circuit Court, at its September term, 1859, by the defendant in error, for

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the recovery of certain bricks, under the statute for the claim and delivery of personal property.

Defendant answers and denies the taking of any of plaintiffs' bricks, claims them as his property, and asks the court to render judgment in his favor for the return of the brick taken from him by the sheriff, and for damages. There was evidence on the part of the plaintiffs tending to show that they (plaintiffs) had purchased from one George W. Graves seven or eight sizes of a certain brick-kiln, near the town of California. There was also evidence tending to show that defendant had hauled some bricks from said kiln.

The defendant introduced evidence tending to show that he (defendant) had purchased of said Graves the whole of the brick-kiln above mentioned; also, evidence tending to show that defendants had purchased brick from James V. Allee, whose yard was seven or eight miles from California, and that that was the pile of bricks taken by the sheriff from the defendants as the property of plaintiff.

Plaintiff then asked the following instructions, among others, which were given by the court against the objection of defendants:

1. If the jury believe from the evidence that the defendants, or either of them, took and carried away the bricks of plaintiff, mentioned in his petition, they must find for the plaintiff the value of the bricks so taken, deducting therefrom the value of the 4,856 that were returned to him by the sheriff; and the jury may also find for the plaintiff damages for the taking of the brick—not, however, to exceed the sum of fifty dollars.

2. Defendants having admitted in their answer that the sheriff delivered to plaintiff 4,856 of the brick claimed by the plaintiff in his petition, the jury will exclude from their consideration all the testimony offered by defendants tending to show that the said brick were not the brick mentioned and claimed in the petition of plaintiff.

The court then, of its own motion, gave the following instruction, which was objected to by the defendants:

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"The court instructs the jury that if they believe from the evidence that the brick taken from the defendants in this case by the sheriff did not belong to plaintiff, they will find for the defendants, and assess the value of the brick so taken, and also the damages the defendants have sustained for the taking and detention thereof, unless they find the facts to be as stated in the first instruction of the plaintiff."

The defendants then asked the following instruction, which was refused by the court:

"If the jury believe from the evidence that the brick taken from the defendants in this case by the sheriff did not belong to plaintiff, they will find for the defendants, and assess the value of the brick so taken, and also the damages the defendants have sustained for the taking and detention thereof."

Smith, for plaintiff in error.

I. The court erred in giving the first instruction asked by the plaintiff, because the evidence does not warrant it. If the defendants did *not* take and carry away plaintiff's brick, yet, under that instruction, he would retain the 4,856 delivered to him by the sheriff.

II. The court erred in giving the second instruction asked by the plaintiff, because there is no such admission in defendants' answer as alleged in said instruction.

III. The instruction given by the court is improper.

IV. The court erred in refusing the instruction asked by the defendant. This instruction is not only borne out by the evidence, but covers every point in the case intended to be covered by plaintiff's first instruction, without its objection.

G. T. White, for defendant in error.

I. The court below did not err in giving the instructions asked for plaintiff, because defendants, in their counter-claim, ask for the rendition of the brick that plaintiff claimed in his petition; and, when we go to the proof, we find that the brick claimed by plaintiff were the brick made by Graves, and not

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the brick made by Allee. Hence, it was improper to permit defendants to prove, under the pleadings, that the sheriff delivered brick taken from a kiln that plaintiff had no claim upon. The proof must not vary from the pleadings.

II. The court below also properly refused the instruction asked by defendants, because, under it, the jury would have been required to lose sight of the brick that plaintiff claimed, and that were not returned by the sheriff, and to find for the defendants, if they believed that the sheriff returned the wrong brick; by which plaintiff would have been mulcted in the costs, and would not have recovered the value of the brick that defendants had converted to their own use, so that the sheriff could not return them to him.

III. Counter-claims have to be set up with the same precision as in a petition. In the form given in the R. C. 1855, p. 1620, No. 15, and which was adopted by an act of the legislature, the value of the thing claimed must be set out. Besides, the third clause of the first section of the Practice Act, p. 1242, expressly says that the party claiming the possession of property shall set out its actual value.

IV. The bill of exceptions does not purport to recite the whole of the evidence; and this case not being brought here by appeal, this court cannot now determine whether the court below erred in refusing a new trial or not. (*Searcy v. Devine*, 4 Mo. 626; *Hays v. Ellison*, 5 Mo. 110; *Foster v. Newlin*, 4 Mo. 18.)

V. The statute expressly prohibits this court from reversing the judgment of any court, unless it shall believe that error was committed against the plaintiff in error, and materially affecting the merits of the action, which cannot be said to be the case here. (R. C. 1855, p. 1300 & 34.)

As this case now stands, this court has but to look to the petition and answer to see that the court below did not err in giving plaintiff's last instruction. The question of variance between the answer and the proof having been clearly raised upon the presentation of this instruction, it then devolved upon defendants to ask leave to amend; and, failing

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to do so, they cannot now complain of the rulings of the court below. (*Blair v. Corby*, 29 Mo. 480, 486; 21 How. U. S. 346.)

VI. A defendant is not permitted to introduce evidence to support a defence not set up in his answer. (28 Mo. 82, 471, 357, 576.)

The defendants did not, in the instruction asked and refused, ask a return of the property taken or its assessed value, as the statute requires, and hence could not complain at the instruction being refused; and any irregularity that may have been in the verdict is no cause for setting it aside. (*Hohenthal v. Watson*, 28 Mo. 361.)

The defendants could not complain at the refusal of the court below to give their instruction, because it was really given, though in a different form, it being in substance contained in the first instruction of plaintiff. (*Maston v. Fanning*, 9 Mo. 302.)

This court will not grant a new trial on the ground that the verdict is against the weight of evidence. (*Jones v. Plummer*, 29 Mo. 456; 28 Mo. 248.)

VII. If there was any irregularity in the verdict, the defendants should have moved to arrest judgment; a motion for a new trial will not reach a defect of this sort. (*Davidson v. Peck*, 4 Mo. 438; *Griffin v. Samuel*, 6 Mo. 50; *Finney v. State*, 9 Mo. 624.)

A mere informal or irregular entry of the judgment by the clerk is no ground for remanding a cause for a new trial. If the judgment is irregular, this court has the power to enter a proper one. (See R. C. 1855, p. 1156—13th & 14th cl. of § 19, and § 20; 1 Mo. 110, 133, 220; 4 Mo. 443.)

The statute pointing out no precise form for the rendition of either a verdict or judgment in this sort of action, is one strong ground for permitting this verdict to stand; the merits of the case have been tried, and no one is injured by the form of the verdict. (See *Dilworth v. McKelvey*, 30 Mo. 155.)

The defendants are not injured by the informality of the

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verdict or judgment, and hence they cannot complain of errors in regard to either. (See *Baldwin v. Dillon*, 30 Mo. 431; R. C. 1855, p. 1256, § 19, cl. 13.)

The plaintiff has the choice of taking either the property or its value, and had a right to make known that choice in the form of an instruction. (See *Pope v. Jenkins*, 30 Mo. 528.)

BATES, Judge, delivered the opinion of the court.

The only complaint made of error in the court below is in the giving and refusal of instructions.

The only objection made to the first instruction given for the plaintiff is that it was not warranted by the evidence. Of this we cannot judge, as the bill of exceptions does not purport to give all the evidence.

The second instruction given for the plaintiff, though not very clearly expressed, contains a correct proposition, and was doubtless properly understood by the jury; at any rate, we see no error in it sufficient to authorize a reversal.

The instruction prayed by the defendant and refused, was in effect given by the court in its own instruction.

Judgment affirmed. Judges Bay and Dryden concur.



CHARLES H. HARDIN, ADMINISTRATOR OF MARY DAWSON, Plaintiff in Error, v. HENRY T. WRIGHT, Defendant in Error.

Consideration—Note.—A note given by an heir as a memorandum or evidence of an amount advanced to him by the payee, is without valuable consideration, and as an evidence of debt is void.

Error to Callaway Circuit Court.

The opinion sufficiently states the case.

C. H. Hardin, for plaintiff in error.

I. Parol testimony is inadmissible to contradict, enlarge, vary, or add to a written instrument. (*Lane v. Price*, 5 Mo.

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101; Singleton v. Fore, 7 Mo. 515; Woodward v. McGaugh, 8 Mo. 161; Walker v. Engler, 30 Mo. 130.)

Under this principle, the first instruction asked by plaintiff ought to have been given by the court. Much of the testimony given by defendant, and which assuredly decided the case for defendant with the jury, was to the effect that the note was not to be collected unless the collection thereof was necessary for the support of Tinsley, who, to the day of his death, had ample for his support without it. This was adding a substantial provision to the note, and conflicted with the above principle of law.

II. The court committed error in admitting evidence as to the conversation between Tinsley and Blount, at the house of Blount, in relation to the will of Tinsley and the violation of his agreement. It was irrelevant, and served to influence the jury to the verdict given.

H. C. Hayden, for defendant in error.

BATES, Judge, delivered the opinion of the court.

This is a suit on a note made by Wright to Tinsley, and bequeathed by Tinsley to the plaintiff's intestate, Mary Dawson, who is daughter of Wright and grand-daughter of Tinsley. The plaintiff Wright answered that the note was given without consideration.

It appeared that mutual accounts had existed between Tinsley and Wright, who disagreed about them and referred their settlement to arbitrators; that the arbitrators found Wright indebted to Tinsley, and that he gave Tinsley the note in suit for the amount so found to be owing. Tinsley had theretofore caused land to be conveyed to Wright, his son-in-law, as an advancement; and evidence was given at the trial tending to prove that the note was given, at the instance of the arbitrators, as evidence of the amount advanced by Tinsley to Wright.

The court, at its own instance, instructed the jury as follows:

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"The defendant claims that he is not bound to pay the note sued upon, on the ground that there was no consideration for the execution of said note; and the court instructs the jury that if they find from the evidence that the note in evidence was executed by defendant Wright in consideration that Tinsley had previously made an advancement or gift to him, said Wright, in land or money, and the said note was given for the sole purpose and on the sole consideration that it should be evidence of the amount so advanced, then said note was given without consideration, and the verdict should be for defendant; but if the jury find that the said note was executed by said Wright in consideration of land conveyed to him by Tinsley, or for a balance due and owing by said Wright to Tinsley on a settlement of their accounts, then there is no want of consideration shown, and the jury should find for plaintiff, although they may believe from the evidence that the parties may have both supposed and believed, at the time of said note being executed, that an amount equal to said note would be distributed to the said Wright, as one of the representatives of said Tinsley, at his death, or devised to said Wright or his children by the will of said Tinsley."

The court also gave the following instructions, on motion of the plaintiff:

2. If the jury find from the evidence that defendant executed the note sued on, and that the same was given for the balance found to be due by defendant to Caleb Tinsley, on the settlement made between them by Blount and Ficklin, they will find for plaintiff the amount of said note and interest.

3. Unless the jury find from the evidence that the note sued on was obtained through fraud or mistake, or that the same is without consideration, they will find for plaintiff the amount of said note and interest.

The court refused the following instruction, moved by the plaintiff:

"It is not competent for the defendant to vary or alter the legal effect of the note sued on by any verbal statements made

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at the time of or subsequent to its execution," and the jury will exclude such statements from their consideration.

The jury having given a verdict for the defendant, and judgment having been given upon it, the plaintiff brings up this case by writ of error.

The principal ground of complaint of the judgment is that the court refused to give the first instruction prayed by the plaintiff. However correct may be the legal proposition contained in that refused instruction, the plaintiff has not been injured by the refusal to give it, because the two instructions given on his motion, as well as that given by the court, all cover the same ground.

Exceptions were taken to the admission of some testimony and to the exclusion of other; but they concerned matters so immaterial, that if the court had erred in reference to them, the error would not be such as to authorize a reversal, and therefore they are not here considered.

Judgment affirmed. Judges Bay and Dryden concur.

THOMAS BROOKS, Respondent, v. HANNIBAL AND ST. JOSEPH
RAILROAD COMPANY, Appellant.

Practice.—Judgment affirmed for failure by appellant to file transcript.

Appeal from Buchanan Court of Common Pleas.

Ensworth, for respondent.

BATES, Judge, delivered the opinion of the court.

The respondent produces in court a transcript of the record, from which it appears that an appeal was granted to the appellant more than thirty days before the beginning of this term of the court, and moves the court to affirm the judgment because the appellant has not filed a transcript of the record. His motion is granted, no cause having been shown to the contrary.

Judges Bay and Dryden concur.

Weston and Plattsburg Railroad Co. v. Cox.—Clemens v. Clemens.

WESTON AND PLATTSBURG RAILROAD COMPANY, Respondent,
v. JACOB COX, Appellant.

Practice.—The bill of exceptions must show the reason for objections to the admission of evidence.

Appeal from Weston Common Pleas Court.

Merryman, for appellant.

H. M. & A. H. Vories and *J. N. Burns*, for respondent.

BATES, Judge, delivered the opinion of the court.

The only point made in this court is that the court below erred in admitting in evidence a contract signed by the defendant. The record shows that the defendant objected to the contract being admitted in evidence, but does not show at all the grounds of objection. It will not, therefore, be considered by this court.

Judgment affirmed. Judges Bay and Dryden concur.



MARY A. CLEMENS, Respondent, v. J. H. CLEMENS *et al.*,
Appellants.

Practice.—Judgment affirmed for want of assignment of errors.

Appeal from Henry Circuit Court.

Ryland & Son, for respondent.

BATES, Judge, delivered the opinion of the court.

In this case an appeal to this court was granted on the 19th day of November, 1860, and a transcript of the record was filed here on the 25th day of December, 1860. Now, at the July term, 1862, no assignment of errors having been filed, the respondent moves that for that reason the judgment be affirmed. No good cause to the contrary being shown, the judgment is affirmed.

Judges Bay and Dryden concur.

Frazer v. Roberts.

WILLIAM W. FRAZER, Appellant, v. LEWIS P. ROBERTS *et al.*,
Respondents.

Jeofails.—A defective averment may be cured by verdict; but where an averment necessary to authorize a recovery is entirely omitted in the pleadings, the defect is not cured, and the judgment will be arrested.

Appeal from Newton Circuit Court.

This suit was commenced by the plaintiff, William W. Frazer, in the Circuit Court of Newton county, at its April term, 1859, by attachment, upon the following petition, to-wit:

"The plaintiff states that at Granby, in said county, and on or about the 10th day of January, 1859, he purchased from the defendant Roberts, who was acting in his own behalf, and as the agent of the defendant Sanders, all the interest of the said Roberts and of the said Sanders in the property, money and effects of the firm of Sanders & Co., and paid therefor the sum of eighteen hundred dollars. The plaintiff further states that the said Roberts, acting as aforesaid, by way of inducing the said plaintiff to make the said purchase, represented that the whole liability of the said firm did not exceed the sum of one thousand dollars; that, relying upon, and confiding in, the said representations, the plaintiff made the said purchase; that the plaintiff has since ascertained that such liability in fact exceeded the sum of three thousand dollars, and that the statements and representations of the said Roberts were grossly false and fraudulent, and by him then well known to be so; wherefore, the plaintiff says that he has sustained damage to the amount of eighteen hundred dollars, for which he asks judgment."

The defendants, in separate answers, deny the false and fraudulent representations, and deny the damage, but admit the sale to plaintiff. At the October term of said court, 1859, a trial was had, and a verdict for plaintiff for one thousand four hundred and fifty-four dollars. Thereupon, defendants filed their motion to set aside the verdict, and for a new trial,

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which being overruled by the court, they excepted. Defendants then filed their motion in arrest of the judgment, which was sustained, and, plaintiff refusing leave to amend, the suit was dismissed.

Fitzgerald, for appellant.

The motion in arrest of judgment should have been denied. The action is purely *ex delicto*, and the omission to state in the petition that Frazer at the time of the purchase was already a partner is no defect, for, although such was the fact, it was not one of the facts which constituted the cause of action, and the proof of it was not necessary to his recovery. (4 Denio, 554.)

If the allegation had been essential to the petition, the omission is fully cured by the allegations of the answer. (1 Chit. Pl. 671.) Even if the defect had not been aided by the answer, it was fully cured by the verdict at common law. (1 Chit. Pl. 673; Gra. Prac. 525.)

Before the statute of amendments, the judgment would not be arrested for a defect like this. To warrant an arrest, the defect must have been one fatal on demurrer. (3 Black. 393; 5 Duer, 699; 5 Duer, 176.) Even then, if the demurrer is not interposed, but issue joined, and the statement omitted in pleading established on the trial, the omission is cured by the verdict. (Gra. Prac. 525; 20 Barb. 493.)

The court will not arrest judgment for any defect which might be supplied after judgment in furtherance of justice. (1 Barb. 51; R. C., p. 1253, § 3 & 6.) And the court is prohibited from staying judgment, or impairing it, by reason of certain defects and omissions; and (8th) for want of any allegation &c., for which demurrer could have been maintained; and (5th) for any mispleading, &c. (R. C., p. 1256, § 19.)

Ryland & Son, for appellant.

I. The vendee of a personal chattel has a remedy against the vendor for the fraud which the latter has practised upon him. (4 Denio, 557.)

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II. Fraud, and damage in consequence, have ever been regarded as a solid foundation for an action. (Pasley v. Freeman, 3 Tenn. 51.)

III. Where there is a defect, imperfection, or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated, or omitted, and without which it is not to be presumed that either the judge would direct the jury to give the verdict, or the jury would have given it, such defect, imperfection, or omission, is cured by the verdict at common law. (Gra. Prac. 525; Mackmurds v. Smith, 7 Term, 518; Ward v. Harris, 2 Bos. & Pul. 265—strong case; 1 Saund. 228, *n.* 1, and authorities therein cited; 1 Maul. & Sel. 237.)

IV. If, however, the adverse pleading expressly admit the fact which ought to have been stated in the defective pleading, and which is substantially incorrect in omitting it, the error becomes, it seems, immaterial. (1 Chit. 673; Brooke v. Brooke et al., Siderfin, 184, as long back as 16th year of Charles I.; United States v. Morris, 10 Wheat. 286; Zerger v. Sailor, 6 Bin. 24.)

V. A petition to be overthrown by a demurrer, under our practice act, must present such defects as are substantial in their nature and fatal in their character, so as to authorize the court to say, taking all the facts to be admitted, that they furnish no cause of action whatever. (Graham v. Canman, 6 Duer, 699; Gen. Mut. Ins. Co. v. Benson, *id.* 158.)

By our statute, no judgment upon verdict shall be reversed by reason of any defect or imperfection to which a demurrer would have been sustained. (R. C. 1256, 8th par. of 19th sec.)

Edwards and Ewing, for respondents.

I. Defendants were not bound to demur to plaintiffs' petition; and if said petition was demurable, the defendants had the right to move in arrest of judgment. If defendants did

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not demur before the trial, they had no right to do so at the trial, and in that case would be bound to resort to their motion in arrest. (Bury v. The City of St. Louis, 12 Mo. 298; Mullen v. Pryor, 12 Mo. 307; Squire et al. v. Steamboat Indiana, 28 Mo. 335; 2 R. C. 1855, p. 1231, § 10; Andrews v. Lynch, 27 Mo. 167; Welch v. Bryan, 28 Mo. 30; Montgomery Co. Bank v. Albany City Bank, 3 Sel., N. Y., 464; Gould v. Glass, 19 Barb. 185.)

II. The plaintiff having failed to amend his petition, (the court having given him leave,) when the motion in arrest filed by defendants was sustained by the court, it is now too late to ask this court to reverse the judgment and grant him a new trial. (See Practice in Civil Cases, R. C. 1855, § 3, p. 1253: "The court may, at any time *before final judgment*," &c.)

III. The verdict for plaintiff did not cure the defects in his petition. (See authorities referred to under the first point.)

DRYDEN, Judge, delivered the opinion of the court.

The parties to this suit being owners, as partners, of a stock of goods at Granby, in Newton county, the defendants sold their interest in the concern, including the uncollected debts, to the plaintiff, in consideration, as it seems, of one thousand eight hundred dollars paid to the defendants, and of the agreement of the plaintiff *to pay the debts of the firm*.

The plaintiff charges that the defendants falsely and fraudulently represented to the plaintiff, at the time of the sale, that the firm debts did not exceed one thousand dollars, whereas, in fact, they amounted to three thousand dollars; and has brought this suit to recover damages for the fraud. The petition fails to show the obligation of the plaintiff to pay the firm debts, and so it does not appear that the plaintiff was in anywise injured by the alleged fraud.

The defendants answered separately. The sale of the goods and the obligation of the plaintiff, by the terms of the contract, to pay the firm debts, is expressly admitted by Roberts, but no such admission appears in the answer of Saunders. A

trial was had resulting in a verdict and judgment for the plaintiff. After an unsuccessful motion for a new trial, the defendants made a motion in arrest of judgment, which was sustained, based upon the omission in the petition already alluded to. The plaintiff refused to avail himself of leave to amend his petition, and the suit was dismissed, and he appealed to this court.

It is conceded by the appellant's counsel that the petition is defective, but he maintains that the fault is caused by the verdict.

"Nothing is to be presumed after verdict but what is expressly stated in the declaration, or necessarily implied from the facts which are stated." (2 Tidd's Prac. 919; 1 Durnf. & East. 145; 7 Durnf. & East. 521.)

The petition, for the want of the allegation that plaintiff was bound to pay the debts of the firm, shows no cause of action, and, since none is shown, none can be presumed to have been proven.

The doctrine that a defective petition is cured by verdict, has its foundation in the supposition that on the trial the plaintiff proved the fact insufficiently averred, and the existence of which is essential to his cause of action; but this presumption can never arise where the fact whose proof is to be presumed is not averred at all, because it is not fair to suppose either that the plaintiff would produce, or that the court would hear, proof of a fact not alleged. (2 Tidd's Pr. 919; 11 Wend. 374; Anderson v. Lynch, 27 Mo. 107; Welch v. Bryan, 28 Mo. 30; Syme v. Steamer Indiana, 28 Mo. 335.)

If the answer of both defendants had admitted the thing omitted to be alleged in the petition, we will not undertake to say whether it would not have aided the petition so as to sustain the judgment; but, as the admission was made by one only of the defendants, it could not have that effect. (10 Wheat. 286; 6 Binn. 24.)

The judgment of the Circuit Court must be affirmed. The other judges concur.

Cecil, Adm'r of Eckols, v. Spurger.

PHILIP W. CECIL, ADMINISTRATOR OF B. W. ECKOLS, deceased,
Respondent, v. AARON SPURGER, Appellant.

Sale—Fraud.—When a vendor sells property having a latent defect of which he is aware, but which he fails to disclose to the vendee, knowing that the latter is acting upon the supposition no such defect exists, he is guilty of a fraud, and the fraud may be pleaded as a defence to an action for the price of the property.

Appeal from Henry Circuit Court.

Ryland & Son, for respondent.

For points, see brief in next case of Cecil et al. v. Tutt.

DRYDEN, Judge, delivered the opinion of the court.

This is a suit brought to foreclose a mortgage, given to secure the payment of a note for three hundred and five dollars, made by Spurger to Cecil, administrator of Eckols. The note was given, it would seem, for the price of a negro belonging to the estate of the plaintiff's intestate, sold by Cecil, as administrator, to the defendant. The defendant filed his answer to the amended petition, which, on motion of the plaintiff, was stricken out for insufficiency, and a final judgment rendered for the debt and for the foreclosure of the mortgage, from which the defendant appealed to this court.

The material part of the answer is as follows: "The defendant further says that the said plaintiff, before and at the time of the sale of said slave, knew that said slave was unsound and diseased, and very old and worthless; and said plaintiff knew, before and at the time of said sale, that the defendant believed said slave to be sound and free from disease, and only about forty-eight years old; and defendant did not know of said unsoundness or disease, or age of said slave; and said plaintiff so knowing that defendant labored under such belief, did not, at any time before or at said sale, disclose to defendant the fact that said slave was unsound and diseased, and much older than forty-eight years, to wit, of the age of seventy years; and said plaintiff fraudulently

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concealed said unsoundness and disease of said slave, and his age; and said defendant avers that, at the time of the sale of said slave, said slave was unsound and diseased, and over the age of forty-eight years, and was wholly worthless; and said slave, within about three weeks after defendant purchased him, died of said unsoundness, disease and old age, and was wholly lost to defendant; wherefore," &c.

What sort of case the evidence may disclose, when the parties come to a trial, we of course cannot foresee; nor have we anything to do with that matter. For the purposes of the question raised by the motion to strike out, we are obliged to take the material allegations of the answer to be true; and if they are found to constitute a defence, the judgment must be reversed; otherwise it will be affirmed.

Where a vendor sells property having a latent defect, of which he knows but which he fails to disclose to the vendee, knowing that the latter is acting upon the supposition no such defect exists, he is guilty of a fraud, and the fraud may be pleaded as a defence to an action for the price of the property. (McAdams v. Cates, 24 Mo. 223; Barrow v. Alexander, 27 Mo. 530.)

The answer in this case comes within the above rule, and the same was therefore improperly stricken out. Let the judgment of the Circuit Court be reversed, and the cause remanded, to be proceeded in, in conformity with this opinion.



PHILIP W. CECIL, ADMINISTRATOR OF B. W. ECKOLS, deceased,
Respondent, v. ANDREW J. TUTT, and GEO. F. ROYSTON,
Appellants.

Appeal from Henry Circuit Court.

Ryland & Son, for respondent.

I. The plaintiff contends he had a right to sue on this note as administrator, and having done so, the plaintiff's petition was not answered by defendants in the first statement of the

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answer filed by them. That part of the answer was therefore properly stricken out. See cases referred to in defendant's brief in the case of Lessing v. Vertrees, decided at this term of the court.

The balance of the answer was properly stricken out, because the said part of said answer and the facts therein stated were not stated in such proper and legal manner as offer a good defence to plaintiff's action.

The only question in the case arises on the latter part of defendants' answer. The answer avers that the negro woman was unsound, and that the man was old and worthless. So far as regards the man nothing is offered by way of defence. What was the unsoundness of the woman? How much did it injure her? What representations were made, and how were they false and fraudulent? The answer is too loose, too general: not made with the particularity and certainty to a common intent in general. It is therefore insufficient, and was properly stricken out. Hence there is no error in the court below, and judgment should be affirmed.

DRYDEN, Judge, delivered the opinion of the court.

This case comes before us in the same way and presents the same question as the case of Cecil, adm'r of Eckols, v. Spurger, decided at the present term of this court; and, for the reason stated in the opinion in that case, the judgment of the Circuit Court in this, is reversed, and the cause remanded, with directions to proceed with the same in conformity with this opinion. The other judges concur.

SARAH TUCKER, Defendant in Error, v. BENJAMIN TUCKER *et al.*, Plaintiffs in Error.

Evidence.—The declarations of the maker of a deed attacked for fraud are not evidence in favor of those claiming under such deed.

Fraud—Dower.—Voluntary deeds in the nature of a will made with the intent to deprive a wife of her dower, would be, as to her, fraudulent and void. (S. C. 29 Mo. 350.)

Error to Cooper Circuit Court.

Adams, for plaintiffs in error.

I. The declarations of the intestate, made at the time of the execution of the deeds, were proper evidence as part of the "*res gestæ*." They formed a part of the instructions, and were explanatory of the main fact, the intention of the testator in executing the deeds. They were verbal acts, made "*dum fervet opus*," and, as such, are always admissible as evidence. (See 1 Phil. Ev. chap. 7, § 7, p. 231 & 232; 1 Greenl. Ev. § 108 & 109; *Crowther v. Gibbons*, 19 Mo. 366.)

II. The declarations of the intestate, made after the execution of the deeds, were inadmissible to affect their validity, whether introduced through conversations with the parties, or otherwise. The intestate himself would have been incompetent to impeach his own deed, and his admissions subsequent to the execution are equally inadmissible. (See 2 R. C. 1855, p. 1577, § 6; *Garland v. Harrison*, 17 Mo. 289.)

III. The sixth and seventh instructions given for plaintiff, assume that deeds, no matter how long before death they may have been made by the intestate, whether *in extremis* or not, are void, if intended to defeat dower.

That is not the law, as settled by this court. Such deeds, to be invalid, must be made *in extremis*, and in anticipation of death. (See S. C. 29 Mo. 350.)

IV. The first issue was defective. It was in the alternative, and the finding upon that issue amounted to nothing. (See *Morris v. Morris*, 28 Mo. 117.)

V. The verdict of the jury upon the second issue being in favor of the defendants, annulled the findings upon the first issue, as the two findings are utterly inconsistent with each other.

Douglass & Hayden, for defendants in error.

The facts of this case bring it clearly within the principle settled by the cases of *Davis v. Davis*, 5 Mo. 183; *Stone v. Stone*, 18 Mo. 389; and in this case in 29 Mo. 450.

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I. The deeds read in evidence, when considered in connection with the other facts and circumstances in the case, show conclusively that their maker intended them to operate in such a manner as to defeat the right of his wife to dower in his slaves.

II. Like a will, the possession and ownership of the property remained with the donor during his life-time; and the donors were not to enjoy it until his death.

It is contended that, in cases like the present, the fraudulent intention of the donor is the only question to be tried; and whether, at the time of making the deeds, the donor was sick and weak in body and mind; or whether interested persons exercised undue influence over him, or colluded with him, and procured the making of the deeds for a fraudulent purpose, is quite immaterial. His intention is the controlling circumstance. If the deeds in question operate prospectively, like a will, and the donor intended them to operate in that manner, they ought, so far as the legal right of the wife is affected, to be regarded as a will, notwithstanding they do not possess the form of that instrument. It is not denied that the husband may dispose of his personal estate by gifts *inter vivos*, though disposed of for the express purpose of defeating the contingent right of the wife to dower in such property. Yet it is contrary to the policy of the law to permit him to dispose of such property by any act or instrument of a testamentary nature.

That the donor's intention in this case, as in the case of a formal will, is to govern in putting upon the deeds a proper construction. (*Lightfoot's Ex'rs v. Colgan et al.*, 5 Mun. 43 & 555, and cases above referred to.)

III. The court properly excluded from the consideration of the jury the declarations of Alexander Tucker, deceased, made at the time of the execution of the deeds to the witness Gibson, that "his intention in making them was to make a provision for his children, and to divide his slaves amongst them, so that he would know to whom they would belong; and that he had no intention of defeating his wife's

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right to dower in his estate ; that he would have ample estate for her benefit left ;" and similar declarations made to the same witness two years before the deeds were made.

Such evidence is not admissible upon any principle of law. If such declarations or statements had been put in the deeds, they would contain evidence of fraud on their face, (see *Twyne's case*, 1 Smith's L. C. 2,) and ought to have no better effect outside the deeds. The deeds explain themselves, and whether honestly or fraudulently made, or for what purpose made, is not to be determined by the statements or declarations of the donor made prior or subsequent to their execution. These declarations are in no sense opposed to the interest of the donor or donees ; but are directly opposed to the interest of the defendant in error. That they are not admissible in evidence, see *Greenl. on Ev.* § 277, 279, 281.

BATES, Judge, delivered the opinion of the court.

Sarah Tucker, widow of Alexander Tucker, brought this suit against the children of Alexander Tucker, to have certain deeds of conveyance of slaves, made by Alexander Tucker to his children, declared void as to her, being in fraud of her rights of dower. The deeds were made by Alexander Tucker shortly before his death and whilst in feeble health, and he thereby retained the right to possess and use the slaves during his life.

The court below directed two issues to be tried by a jury, as follows :

1. Were the deeds, mentioned in the petition of the plaintiff, or any one of them, made to defraud the plaintiff of her dower in said slaves, or not ?
2. Did the defendants collude with the deceased, or in consequence of the weak state of his mind did they exercise an undue influence and control over him, and thereby procure the making of said deeds of gift, or any one of them, in their favor, for the purpose of defrauding the plaintiff of her dower ?

The jury found the first issue for the plaintiff, and the second for the defendant. Upon those findings the court

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rendered judgment for the plaintiff. At the trial of those issues, a number of instructions were given to the jury, which, taken together, properly stated the law of the case. Although the verbiage of some of them is subject to criticism, yet, taken together, they fairly stated the case to the jury, and it is not thought necessary here to copy them and comment upon them.

During the trial the defendants offered to prove, by a witness, that Alexander Tucker, at the time of the execution of the deeds to his children, stated that his intention in making the deeds was to make a provision for his children, and to divide his slaves amongst them, so that he would know to whom they would belong; and that he had no intention of defeating his wife's rights of dower in his estate; and that he would have ample estate for her benefit left. The court, upon the objection of the plaintiff, excluded this testimony, of which the defendants complain as error.

The intention of the maker of the deeds was the direct subject of examination, and the presumption was (in favor of the defendants) that the deeds were honestly made, and not for the purpose of defrauding the plaintiff. We are unable to perceive how the evidence offered could have strengthened this presumption. Had the declarations been incorporated in the deeds themselves, they would have been no stronger than they were. No assertions or protestations of the maker of the deeds, of their honest intent, can be stronger than those implied in his execution of the deeds; and, therefore, his declarations were properly excluded.

Objection is here made to the form in which the issues are stated; but as no such objection was made in the court below, it will not be regarded.

Finally, it is objected, that notwithstanding the finding of the first issue for the plaintiff, judgment should have been rendered for the defendant.

We consider that point settled by this court in this case when heretofore in this court, (29 Mo. 350,) and the cases of *Davis v. Davis*, 5 Mo. 189, and *Stone v. Stone*, 18 Mo. 389.

The judgment of the court below is affirmed.

HENRY C. FARRIS, Respondent, v. BENJAMIN F. CATLETT, Appellant.

Note—Endorsee.—The endorsee of a negotiable note, endorsed to him after maturity, takes it subject to the equities existing between the maker and endorser.

Note—Equity.—An answer setting forth that the note sued upon was endorsed to the holder after maturity as a collateral security, and with notice of an agreement between the maker and payee that the note was to be delivered to trustees to pay off encumbrances upon the lands in consideration of the purchase of which the note was given, presents a defence in equity which it was error to strike out and give judgment for the plaintiff.

Appeal from Buchanan Court of Common Pleas.

Vories & Vories, for appellant.

The only question presented in this case is, does the answer of the defendant present facts which constitute a defence to the plaintiff's action? It is contended by the defendant that the plaintiff having taken the note not for value, but as collateral security for another debt; or that, if he had notice of the facts, as alleged in the answer; or that, if he took the note after due, (all of which facts are admitted by the motion to strike out the answer,) he stands just in the same position that Nixon, the payee of the note, would have stood if he had brought suit to recover the note himself. (*Chitty on Bills*, s. p. 217, 218, and notes; *Story on Bills of Exchange*, § 187 and following; *Ship & Woodbridge v. Stacker et al.*, 8 Mo. 145; 2 Grenl. Ev. § 199.)

Loan & Bassett, for respondent.

I. The answer was properly stricken out. The matters contained in it present no bar to plaintiff's cause of action. The note is absolute on its face, and if the payee of the note failed to observe his agreement with the maker thereof, his remedy is on the contract, and not by a defence to the note. (*Atwood v. Lewis*, 6 Mo. 392; *Bircher v. Payne*, 7 Mo. 462.) The matters set forth in the answer do not show a payment, defeasance, or other discharge of the note.

BATES, Judge, delivered the opinion of the court.

Farris v. Catlett.

This is a suit on a negotiable note, made by the defendant to Nixon, and by him endorsed to the plaintiff.

The defendant answered that the note was, after maturity, assigned by Nixon, without consideration, to the plaintiff as collateral security for a precedent debt; that when the note was given it was part of the consideration of the purchase, by defendant from Nixon of a piece of land which was then encumbered by several deeds of trust, (which included also other lands) and that it was agreed between the defendant, said Nixon, and the parties to said deeds of trust, that the note should be turned over to one of the trustees in said deeds of trust, who should collect the same and pay the amount thereof upon the debts secured by said deeds of trust, in proportion to their several amounts; and thereupon the land was to be released from the liens of said deeds of trust; of all which the plaintiff had full knowledge when he acquired said note; that the defendant has been compelled to buy said deeds of trust at a cost exceeding the amount of the note to prevent the sale of the land under the deeds of trust, and now credits the amount of said note on the debts secured by the deeds of trust; and the defendant further stated that the whole consideration of the purchase of the land has been paid except this note.

On motion, the answer was stricken out and judgment given for plaintiff.

The answer was improperly stricken out. It contained no defence at law, for the note was due and payable as therein specified, notwithstanding the collateral arrangement made at the time of execution. (*Atwood v. Lewis*, 6 Mo. 392; *Bircher v. Payne*, 7 Mo. 462.) In equity, however, the matter stated in the answer did constitute a defence, for the plaintiff, under the circumstances stated in the answer, stands in no better position than Nixon, the payee, himself; and if Nixon should require the payment to himself of the note, in violation of the agreement stated in the answer, it would be fraud upon the defendant.

Judgment reversed, and cause remanded, that the answer may be reinstated. Judges Bay and Dryden concur.

TARLTON RAILEY *et al.*, Plaintiffs in Error, v. JAMES PORTER
et al., Defendants in Error.

Bailment—Forwarder.—It is the duty of a forwarding merchant to advise his consignee of the shipment made to his address, and the failure of the carrier to deliver the goods shipped in accordance with the bill of lading will not discharge him of liability.

Error to Jackson Circuit Court.

This was an action to recover the value of a lot of China hemp seed which, it is alleged by plaintiffs, was wholly lost to them through the negligence, carelessness and inattention of defendants as commission and forwarding merchants.

Defendants were commission and forwarding merchants at Maxwell's Landing, on the Missouri river, in Jackson county. In the month of March, 1857, plaintiffs sent the hemp seed to defendants, with instructions to them to ship it to C. O. Wallace, at the city of Lexington. Defendants undertook to make the shipment, and on the 4th day of April, 1857, made it on the steamboat A. C. Goddin. Defendants took but one bill of lading. By this the boat obligated herself to deliver the seed to C. O. Wallace, at Lexington. Plaintiffs had made arrangements with C. O. Wallace to sell the hemp seed, and it could have been sold, had he received it, at ten dollars per bushel. The boat did not deliver it to C. O. Wallace, but delivered it to T. B. Wallace, who, not knowing for whom it was designed, or to whom it belonged, retained it until the season for sowing had passed. There was testimony tending to show that plaintiffs had endeavored to ascertain what had become of the seed, but could not do so. It was afterwards sold for freight and charges.

The defendants in their answer admit that they took but one bill of lading, and insist that in doing this they did all that could be required of them as forwarding merchants. It is not pretended that defendants gave any notice whatever to C. O. Wallace of the shipment of the seed.

The cause was submitted to the court without the interven-

tion of a jury. The court declared the law as follows, on the motion of plaintiffs :

1. The law makes it the duty of forwarding and commission merchants to take triplicate bills of lading from vessels on which they may make shipments for others, and to forward one of these to the consignee of the shipment, to retain one, and to deliver one to the vessel.

2. It is admitted by the answer that defendants were forwarding and commission merchants, and that as such they undertook to ship for plaintiffs, from Maxwell's Landing, in Jackson county, to C. O. Wallace, in Lexington, Missouri, a quantity of hemp seed, and took but one bill of lading.

3. That in shipping said seed for plaintiffs to said C. O. Wallace, it was the duty of defendants to have exercised ordinary care, and if the court should find from the evidence that defendants in making said shipment failed to exercise ordinary care, or were guilty of ordinary negligence, then defendants are liable to plaintiffs in this action, and plaintiffs are entitled to recover of defendants such damages as the evidence may show they have sustained by reason of such neglect in regard to said shipment.

The court also further declared the law as to the measure of damages, &c., in the cause, but it does not require stating here.

On motion of defendant, the court declared the law as follows :

If the court believe from the evidence that defendants received the hemp seed in controversy to be shipped to Lexington to C. O. Wallace, and that defendants did, within a reasonable time after receiving said hemp seed, ship the same, and took from the boat on which the same was shipped, a bill of lading of said boat signed by the proper officer, whereby said boat was bound to deliver said hemp seed to said C. O. Wallace, at Lexington, and the boat refused to wait until triplicate bills of lading could be signed, then the said steamboat was liable to plaintiffs for any non-performance of said contract of freightment, and that at the time the liability of said boat commenced the liability of the defendants ceased.

To this declaration of the law plaintiffs duly excepted.

Chrisman & Comingo, and *R. L. Y. Peyton*, for plaintiffs in error.

I. It was the duty of defendants to take triplicate bills of lading. (Addison on Cont. 471; Abbott on Shipping, 271; Bouv. L. Dic., tit. Bills of Lading; 4 Denio, 430; Flanders on Shipping, 476.) In failing to do this, defendants were guilty of negligence, and are liable to plaintiffs for damages resulting. (2 Kent, 591, s. p.)

2. The court erred in declaring the law as asked by the defendants. They admit that they took but one bill of lading, and insist that having done this they are not liable, &c. The law as declared by this court is wholly incompatible with the theory of the defence as contained in the answer. Furthermore, it does not appear that defendants intended taking more than one bill of lading. It is true, the witness Bledsoe, who made the shipment, states that the clerk of the boat refused to wait, &c.; but he at the same time states that it was not his habit to take more than one bill of lading, and it is scarcely inferable from his testimony that he intended to take more than one in this case. But be this as it may, it is suggested that even if it was owing to the conduct of the officers of the boat that triplicate bills were not signed, it at once became the duty of defendants to notify the consignee, C. O. Wallace, of the shipment by writing to him, or to notify the plaintiffs of the fact that the officers of the boat had refused to sign the requisite number of bills of lading; and not having done this, they are chargeable with negligence, and are liable for all resulting consequences.

Ryland & Son, for defendants in error.

I. The plaintiffs allege that defendants are guilty of negligence and inattention in shipping their hemp seed; and place this negligence and inattention in the mere fact alone, that defendants failed to take three bills of lading. This omission is not such negligence or inattention as will render the defendants liable.

Railey v. Porter.

II. One bill of lading is sufficient and enough to make the vessel liable ; and if that one contain an acknowledgment of the reception of the goods for transportation, sufficiently designated as to marks and numbers, and the place where to be delivered, and the person to whom, and the price of freight, and be signed by an officer of the vessel, the boat is bound to perform this contract of affreightment, and the shipper is not liable for the misconduct of the boat.

III. The plaintiffs have not alleged any facts in their petition showing a liability on the part of defendants, and they have utterly failed to prove any facts making them liable.

IV. What is a bill of lading ? It is the written evidence of a contract for the carriage and delivery of goods sent by water for a certain freight. This bill of lading, taken by the shippers, the defendants in this case, is as good and binding on the boat as if there had been a dozen counterparts or copies. It became the duty of the boat to perform the contract, and if there be loss or damage to the owner of the goods shipped, he must seek redress from the boat. (See *Abbott on Shipping*, t. p. 212 ; *Covill v. Hill*, 4 Denio, 330 ; *Mason v. Lickbarrow*, 1 H. B. 360 ; 3 Kent's Com. 268, t. p.)

The steamboat, the common carrier, is liable, because the boat failed to deliver according to the bill of lading. All injury to plaintiffs accrued after the boat got to Lexington, and the defendants had no hand in causing the injury there or at any time.

The judgment below should not, therefore, be reversed.

BATES, Judge, delivered the opinion of the court.

The instruction given for defendant was wrong.

Notwithstanding that the forwarding merchants may have been prevented by the misconduct of the officers of the boat from getting three bills of lading in the usual manner, they yet were bound to give advice to the consignee of the shipment made to him, and the liability of the boat does not discharge them from liability.

Judgment reversed and cause remanded. Judges Bay and Dryden concur.

ARZUBA CHILES, Respondent, v. AARON F. GARRISON *et al.*,
Appellants.

Bailment—Loan.—Where money was deposited by plaintiff with defendants as a special deposit, and the parties subsequently agreed that the plaintiff should lend and the defendants borrow the money, the loan was complete if nothing remained to be done at any future time, and the defendants were liable although subsequently robbed of the money.

Appeal from Jackson Circuit Court.

This was an action for money lent by the plaintiff to defendants. The answer denies the loan, and denies any indebtedness to plaintiff. At the date of the alleged loan the money was in special deposit with the defendants, and was afterward stolen from them.

Hovey & Henry, for appellants.

I. The instruction given by the court, upon its own motion, makes no distinction between a special and general deposit. (See *Coffin v. Anderson*, 4 Blackf., Ind., 403.)

II. This instruction is calculated to mislead the jury. The words "and that nothing remained to be done," etc., leave them totally uninstructed as to the very point in issue, to-wit: What was legally necessary to constitute a loan? and, herein, of the necessity that defendants' instructions should have been given also. (See *Coleman v. Roberts*, 1 Mo. 97, 69.)

Hicks & Adams, for respondent.

I. The instruction given by the court, on its own motion, covered the whole case; and, therefore, all the other instructions were properly refused. The construction that was given left it to the jury to determine whether the money had been received by the appellants, and whether the loan was completed; or whether the money was afterwards to be delivered as a loan, and was lost by robbery. This was the whole question in the case; and the jury having found the issue for the plaintiff, their verdict ought not to be disturbed. The jury were the proper judges of the weight of evidence.

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The question whether, under all the circumstances, there had been a loan and an acceptance thereof, was one of fact, and was properly submitted to the jury. (Chit. on Con. 390; *Edan v. Duffield*, 1 Q. Bench, 302 & 307; *Lilly White v. Devereaux*, 15 Mee. & W. 285, 291.)

There is analogy between loan and deposit. (See *Sto. on Bail.*, § 55, 95.)

BAY, Judge, delivered the opinion of the court.

The only question presented by the record in this case is as to the propriety of the instruction given by the court. If the loan was complete before the robbery, then the loss fell upon the defendants; but if, under and by virtue of the terms of the contract, anything remained to be done to vest in the defendants the right to the money, then the loss was incurred by the plaintiff. We think no question can arise in regard to the delivery, for the money was already in the custody and possession of the defendants, having been previously left with them in special deposit.

The court refused all the instructions asked on both sides, and gave in lieu of them the following:

"If the jury find from the evidence that the plaintiff, by her agent, William G. Chiles, agreed with the defendant Garrison, for and on behalf of the firm of Garrison & Hughes, to loan to them the sum of eight hundred dollars, and that Garrison agreed, on behalf of said firm, to borrow the same, and that the money was at the time on deposit with said firm, and that nothing remained to be done at any future time to complete the loan, the jury will find for the plaintiff; but if it was only agreed that the money should be loaned, and it was further agreed that William G. Chiles, or some one else on the part of plaintiff, should go to defendants to obtain their note or count the money, or both, before the loan was to be complete, and that, before the giving a note or counting the money, the safe of defendants was robbed, without the fault of the defendants, or either of them, and the money stolen, they will find for the defendants."

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Whether the loan was perfected or not before the robbery, was a question of fact, depending upon the terms of the contract as disclosed by the evidence in the cause, and the instruction very properly submitted it to the jury.

We see no objection to the first and fourth instructions asked by the defendants, but they were substantially given in the instruction of the court, and their refusal furnishes no ground for a reversal of the judgment.

Upon the whole, we think the instruction given covers the law of the case; and as the jury have passed upon the facts, we see no good reason to disturb their verdict.

With the concurrence of the other judges, the judgment of the court below will be affirmed.

E. J. STANDIFORD, Respondent, v. T. G. GENTRY, Appellant.

Contract, to marry.—In a suit for breach of promise of marriage, it is necessary to prove the mutual promises of both plaintiff and defendant.

Appeal from Texas Circuit Court.

G. T. White, for appellant.

The court erred in not arresting the judgment. There should have been a separate finding of the jury on both counts, as they were separate and distinct causes of action. (See *Mooney v. Kennett*, 19 Mo. 551.) The jury must find all the facts put in issue. (*Fenwick v. Logan*, 1 Mo. 283; *Hickman v. Bird*, 1 Mo. 350; *Talbot v. Jones*, 5 Mo. 217.)

Upon a consideration of the whole case, the court below should have set aside the verdict of the jury. There was no proof of a mutual agreement to marry, a mutual offer, or preparation of either, neither direct nor circumstantial; plaintiff in fact seemed to attempt to prove that she was at some time making preparations to marry, but signally failed. (See 2 Stark. on Ev., p. 707, n. 1; 15 Mass. 1.)

BATES, Judge, delivered the opinion of the court.

The petition contains two counts. The first count charges

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a mutual contract to marry between the plaintiff and defendant, and a breach of the contract by the defendant, who married another woman; and prays judgment for two thousand dollars damages. The second count charges that the defendant debauched and carnally knew the plaintiff, whereby she became pregnant with child and was delivered of two children; and prays judgment that defendant pay one hundred dollars per year for seven years for the maintenance of the children.

The defendant answered and put in issue the material allegations of both counts of the petition. The case was tried by a jury, and a verdict was given for the plaintiff on the first count, and no verdict given on the second count.

A number of instructions were given to the jury, and in some of them the defendant was said to be liable in a promise to marry the plaintiff without any corresponding promise on the part of the plaintiff to marry the defendant. For this cause the judgment must be reversed, without specifying other errors with which the case is full from the petition to the final judgment.

The judgment of the court below will be reversed and the cause remanded. Judges Bay and Dryden concur.

JAMES M. PATTERSON, Plaintiff in Error, v. ALBERT G. HOLLISTER, Defendant in Error.

Practice—Motion to strike out.—A motion to strike out part of a pleading, described by reference to line and page, does not sufficiently specify the part referred to, and the Supreme Court will not review the action of the inferior court upon such motion.

Error to Holt Circuit Court.

H. M. Vories, for plaintiff in error.

BATES, Judge, delivered the opinion of the court.

This is a suit upon a promissory note, to which a defence, in its nature legal, was set up. A motion was made to strike

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out a portion of the answer, described as beginning at a certain word in a certain line of the answer, and ending at another word in another line. We cannot tell to what portion of the answer the motion applied, and cannot therefore review it. The case was tried by the court without a jury, and no declarations of law were asked.

We cannot review the judgment.

Judgment affirmed. Judges Bay and Dryden concur.



LIVINGSTON COUNTY, Appellant, v. JOHN GRAVES *et al.*, Respondents.

Contract—Repairs.—Where the defendant contracted with the plaintiff to build a bridge in accordance with certain plans and specifications, and bound himself to keep such bridge in repair for the term of three years, he is not liable to rebuild if the bridge be destroyed by fire.

Appeal from Livingston Circuit Court.

Aikman Welch, attorney general, for appellant.

I. The court erred in refusing to strike out parts of defendants' answer, as moved by plaintiff. The defences set up are inconsistent. In the fifth and sixth counts defendants deny the validity of the contract, and deny all responsibility thereon. In the first and second counts the defendants admit their responsibility on the contract, but attempt to confine and limit that responsibility. In the third count they plead a full compliance with the contract as they construe it. In the fourth count they plead a want of consideration. These inconsistent defences should have been stricken out. (2 R. C. 1855, p. 1233, § 14.)

II. The court erred in permitting respondents to read in evidence the order of the Livingston County Court. Said order was not competent testimony to vary the terms of the contract sued upon. The responsibility of respondents was upon their bond, and this order could not increase or diminish

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that responsibility. A bond executed in pursuance of a statute is valid though not exactly conforming to such statute; *a fortiori*, the bond will be valid though it may vary in a single particular from the order of the county court. (State v. Thomas, 17 Mo. 503; Gathwright v. Callaway Co. 10 Mo. 664; United States v. Tingley, 5 Peters, 128; Grant & Finney v. Brotherton's adm'r, 7 Mo. 458. See also Brown v. Crawford Co. 8 Mo. 660; and Bogarth v. Caldwell Co. 9 Mo. 355.)

III. Where an agent or servant shall depart from the instructions of his principal or master in the performance of some act, and the principal or master, after being informed of such variance, shall acquiesce therein for a considerable length of time, and until rights and responsibilities have accrued thereon, such principal or master will be held as having ratified the act, and it becomes as valid as if strictly in accordance with the instruction given, and neither the principal or master, nor the party with whom the servant or agent may contract, will be allowed to take advantage of such variance after such contract shall have been fully complied with by one party and partially so by the other. A subsequent ratification is equivalent to a previous authority. (Paley on Agency, 143; Ward v. Evans, 6 Modern, 37; Thorold v. Smith, 11 Modern, 88; Wilson v. Poulter, 2 Strange, 859; Lent v. Padelford, 10 Mass. 236; Barnaby v. Barnaby, 1 Pick. 221; Culver v. Ashley, 19 Pick. 300; 1 Amer. Leading Cases, 589, and authorities cited.) This rule is as applicable to corporations as to individuals. (Angell & Ames on Corp. 351; Fleckner v. The Bank of the U. S., 8 Wheat. 363.)

IV. The covenant of the respondents to keep the bridge in repair for three years includes a covenant to rebuild in case of the destruction of such bridge by fire or other accident. A party will be excused from the performance of duty when such duty is created *by law*, without any default in him; but where the party *by his own contract* creates such duty, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. (2 Sanders, 422, n. 2; Phillips v. Stevens,

16 Mass. 237 ; Beach v. Crain, 2 Comst., N. Y., 93 ; Chitty on Cont. 343, 344 ; Pym v. Blackburn, 3 Vesey, 38 ; Taylor on Landlord and Tenant, 230.)

The Legislature has changed this well-established rule of law so far as a tenant's liability is concerned. (R. C. 1855, p. 352.) But the principle remains in all its force in all other cases to which it may be applicable ; *expressio unius est exclusio alterius*. The defendants in the first count of their answer admit that the covenant to keep in repair will include a total loss arising "from the perils to which bridges are ordinarily liable, to-wit, the dangers from floods, high water, and the like;" but a covenant to repair includes a loss by fire as well as by flood.

Ray, for respondents.

There are several matters of defence set up in the answer, all of which are designed to raise the proper construction and validity of the bond sued on, to three of which only I propose to call the attention of the court :

I. That a loss by fire was not within the meaning of the contracting parties, and consequently not within the provision and protection of the bond.

II. That by the fourth section of act on bridges, 1845, the County Court are to determine how long the bridge shall be kept in repair (not less than two nor more than four years) ; and that said court by its order dated December 19, 1853, determined that it should be kept in repair for *two* years only after its completion, (12th of November, 1855,) and that it was not destroyed in that time, but after its expiration, (say 14th of February, 1858.) That the commissioner, in taking the bond for *three* years, violated the order of the court, exceeded his instructions, and that the bond is without authority of law, and therefore void ; that same was not binding on the county, and if so not obligatory on defendants. Contracts to be valid must be binding on *both* parties, or neither is bound.

III. That the covenant to *repair* contained in said bond is

without consideration, and therefore void, the whole of the contract price (\$2,800) having been paid for the *erection*, and nothing paid, or agreed to be paid, for the covenant to repair.

The first and third propositions are mere questions of law—as a matter of construction—to be determined by inspection of the bond.

In opposition to the doctrine contained in the first proposition, it is contended “that it is an established rule that when a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he can, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.” That this rule, though general, is not inflexible or inexorable, reference is had to the following authorities, to-wit: 22 Mo. 187; 6 J. J. Marshall, 528; 2 Dana, 229; 6 Mo. 324; 8 Mo. 33; 9 Mo. 867.)

The *intent* of the parties is the fundamental rule in construing contracts, to be arrived at, it is true, by the known rules of construction. These authorities, it is submitted, support this first proposition.

The fourth section of the act on bridges provides that the County Court shall first determine how long the bridges shall be kept in repair, (not less than two nor more than four years,) and the proof shows that said court determined by its order that the bridge should be kept in repair two years.) That determination of the court constituted the authority of the commissioner in the premises, and fixed the *limits* of his authority to act. He could not go beyond it or outside of it. If he did his principal ceased to be bound, and if so, the other party was under no obligation to perform a contract which the opposite party might disregard or not at his pleasure. The contract to be valid must be binding on both sides. Besides that, the petition shows that the bridge was in fact built and kept in repair for *two* years and more before it was destroyed, and that was in accordance to the law of the case and the order of the court in the premises, and the commis-

sioner had no authority to take any other sort of bond for any other length of time, either greater or less. (4 Mo. 84.)

BATES, Judge, delivered the opinion of the court.

This suit is brought upon a bond executed to the plaintiff by the defendants as the securities of Isaac C. Waldrip, conditioned, that whereas said Waldrip takes the contract for the building of a bridge across the east fork of Grand river, and describing the bridge and stating the time limited for its completion, "now if the said Isaac C. Waldrip shall construct said bridge at said point on said river according to the plan, specifications, manner, and of the materials as herein above set forth, by the time as herein set forth, and shall keep said bridge in repair for three years, then this bond is to be void, otherwise in force." The bond was dated June 2d, 1854. The bridge was completed about the 12th day of November, 1855, and Waldrip was paid the price agreed in the bond for its construction. On the 14th of February, 1858, the bridge was destroyed by fire, the cause of which fire was unknown. The plaintiff claims that, under the condition expressed in the bond that Waldrip should keep said bridge in repair for three years, the defendants are bound to make good the loss sustained by the destruction of the bridge by fire. The court below gave finding and judgment for defendants, and the plaintiff brings the case into this court.

The first question for consideration, and the only one which we think it necessary to examine, is whether the condition to keep in repair for three years included an obligation on the part of the builder to rebuild when the bridge was destroyed by an accidental fire. The prime object to be accomplished by the contract of the parties was the erection of the bridge; and all the several parts of the contract are to be regarded as incidents of that main object. The agreement to keep the bridge in repair for a time can only be regarded as a providing means whereby it could be more certainly ascertained that the builder had fully complied with his contract by erecting a bridge proper for the use for which it was

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required. The destruction by fire had no connection with any defect in the construction of the bridge, and did not result from any failure on the part of the builder to perform any part of his contract for the erection of the bridge.

Judgment affirmed. Judges Bay and Dryden concur.



ALFRED J. BASYE, Plaintiff in Error, v. JAMES AMBROSE, Defendant in Error.

Pleading—condition precedent.—In declaring on a contract containing stipulations to be performed by the plaintiff precedent to the performance of the agreement of the defendant, the plaintiff must allege the performance of such stipulations or a sufficient excuse for their non-performance.

Error to Callaway Circuit Court.

This was a suit upon a sealed agreement between the plaintiff and one Brauchman of the one part, and the defendant of the other part. Brauchman assigned his interest to Basye, who sued for the breach of contract by defendant, alleging also a parol variation of the contract. The defendant demurred for defect of parties plaintiff and for want of allegation of performance of the plaintiff's portion of the agreement. The demurrer was sustained and plaintiff appealed.

White, for plaintiff in error.

In 1 Chitty, pages 11 and 12, the rule is laid down that when there is one or more covenantees, and one dies, suit is to be brought by the survivor. Also see 1 Saunders, 156; and we insist that if one assigns all interest he has to another, the same rule would apply.

Gardenhire, for defendant in error.

I. The terms of a written contract under seal cannot be changed by parol agreement. (3 Blackf. 353, 358; 4 Eng. 488, 495; 11 Mo. 659, 661.)

II. Bayse cannot sustain an action on the bond. His remedy, if any, is upon the new agreement. But this is by parol, and not to be performed in a year; (3 Blackf. 358, 359; 1 R. C. 807, § 5;) and from its terms could not be performed in a year. (Chitty on Cont. s. p. 71, and *n.*; 13 Pick. 5; 15 Me. 201; 2 Parsons on Cont. 316, and *n.*)

III. The petition does not show an *executed* contract on one side even. It shows no performance of nor an offer to perform the conditions precedent on the part of the plaintiff.

DRYDEN, Judge, delivered the opinion of the court.

In declaring on a contract containing stipulations to be performed by the plaintiff precedent to the performance of the agreement of the defendant, the plaintiff must show the performance of such stipulations, or a sufficient excuse for their non-performance.

The contract sued on in this case was made in Missouri in anticipation of an expedition to California in pursuit of gold. The stipulations on the part of plaintiff and Brauchman, as shown by the petition, were "to procure the necessary oxen and wagons, provisions, tools and clothing, and leather for shoes, on the trip and whilst in California—necessaries proper and suitable for the expedition both in going out and while remaining there;" in consideration of which the defendant was to go with the parties, aid them on the way, and serve them for three years, and account to them for one half of all gold he should dig or discover during the time.

The following is all that is in the petition affecting to show a compliance with the agreement on the plaintiff's part:

"Plaintiff further states that he and said Brauchman, in the spring of said year 1849, started to California with *teams, wagons and provisions* sufficient for the trip, taking defendant with them according to their said contract with him."

The breach of the defendant's agreement is then averred and recovery asked. The defendant demurred to the petition, assigning among other causes of demurrer, the omission to aver the performance of the plaintiff's part of the contract.

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The demurrer was sustained, and judgment given for the defendant.

The demurrer was well taken. The liability of the defendant is dependent as well upon the furnishing of *tools, clothing*, and leather for shoes, as upon the furnishing of the oxen, wagon and provisions; and the plaintiff having omitted to show by his petition that he had furnished these, has failed to show any cause of action against the defendant.

Let the judgment be affirmed. The other judges concur.



THE COUNTY OF HENRY, Appellant, v. ROBERT ALLEN, Respondent.

Agent—Evidence.—Where an agent was appointed to receive for a special purpose and pay out moneys as he should be directed by his principal, evidence that he had received money which he refused to pay to his principal when demanded was erroneously excluded from the consideration of the jury.

Appeal from Henry Circuit Court.

Aikman Welch, attorney general, for appellant.

I. The court erred in excluding from the jury the testimony of witness Stone and the receipt of defendant produced by said witness. The records of the County Court, which were read in evidence, proved that defendant Allen was the agent of said county to receive the railroad funds, and the testimony of Stone proves conclusively the receipt of certain money by defendant as such agent; and this testimony was relevant and legal, and should not have been excluded.

II. By the terms of the order of the County Court appointing defendant as agent to receive this railroad subscription, he is expressly made the agent of the county, and not the agent of the railroad company. The County Court had no power to appoint and could not have appointed an agent for the railroad company. By this order the defendant was forbidden to pay over to the company unless ordered to do so by the court; and until such order should be made, the de-

fendant and all funds in his hands were subject to the control of the County Court. The agency could be revoked, or the funds could be required to be paid over to the county, or both could be done.

III. The defendant cannot avail himself of any supposed want of demand for the money received by him. Such a defence can only be available when the defendant expressly sets it up in his answer by way of defence, and shall accompany such a defence with a tender of the amount that is due. In this case no such defence was expressly set up, nor was any tender made. Had it been otherwise, it was only a question which affected the costs (R. C. 1855, p. 1448, § 34); and no ground was furnished by this for the exclusion of evidence otherwise competent.

IV. The receipts of the defendant were neither the foundation of the suit nor the foundation of defendant's liability; and the statutes did not require the receipts to be filed with the petition. They were the mere evidence of defendant's liability, and the court erred in excluding them as evidence because not so filed. The statutes attach to such failure no such penalty, and the court erred in their exclusion for such a cause. (2 R. C. 1855, p. 1241, § 60.)

BATES, Judge, delivered the opinion of the court.

The petition states that the defendant was indebted to the plaintiff for a specified sum of money, had and received by the defendant from the plaintiff in several sums at times specified; that demand had been made upon defendant for payment, and that the money still remained due and unpaid. The answer of the defendant denied his indebtedness to the plaintiff in the sums mentioned, and also denies his indebtedness to the plaintiff for any sum for money had and received from the plaintiff.

The plaintiff gave in evidence an order of the County Court of Henry county, appointing the defendant "agent to represent Henry County in the Pacific Railroad Company; to receive and transfer the stock of said company; to give its vote

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and receive its dividend from said company; to receive the money from the county for the calls of the company, for the stock subscribed by said county, and pay the same over to the company when so ordered by the court; and superintend all transactions necessary between said Henry County and said Pacific Railroad Company, according to law and the order of the County Court of said county of Henry; and that he enter into bond to the County of Henry, in the sum of twenty thousand dollars, for the faithful performance of his duty."

The plaintiff then proved by the collector the payment by him to the defendant of the sums of money mentioned in the petition, from moneys collected by him from a tax levied by the County Court to pay the subscription of stock to the Pacific Railroad Company, and gave in evidence the defendant's receipts therefor; and also gave in evidence an order of the County Court to pay the moneys so received by him into the county treasury, and proved service on defendant of a copy of that order. The defendant then moved the court to exclude from the jury all the testimony given by the collector, and also the receipts given by the defendant, which motion the court granted, and excluded them from the consideration of the jury. The plaintiff took a non-suit, with leave to move to set it aside; and, after such motion was ineffectually made, brings the case to this court.

We are unable to perceive upon what grounds the court excluded the testimony. It tended directly to prove the allegations of the petition which were denied by the answer—that is, that the defendant had received the money from the plaintiff; for the collector was the agent of plaintiff to pay the money to defendant, and the defendant was agent of the plaintiff to receive the same, without any authority to appropriate it to any use without the order of the County Court.

So far as we can see, the evidence appears to have been legal and competent.

Judgment reversed, non-suit set aside, and cause remanded. Judges Bay and Dryden concur.

JAMES E. FROST, Appellant, v. JOHN H. WINSTON, Respondent.

Guardian—Ward.—If a guardian voluntarily disburse on account of his ward a sum greater than the ward's estate, he has no recourse upon the ward for the overplus unless there be a special promise to pay it. (Wyatt v. Woods, 31 Mo. 351, affirmed.)

Guardian—Accounts—Interest.—Where a guardian had moneys of his ward, and had lent or could have lent the same at the highest legal rate of interest, when called to account he will be properly charged with that rate, with annual rests, but should be allowed a reasonable commission as the guarantor of payment.

Appeal from Weston Court of Common Pleas.

Vories, Spratt, and Merryman, for appellant.

I. The eighth error of the court is the most prominent one in the case. It is in relation to the computation of interest. The defendant excepted to the report of the commissioner because the commissioner compounded the interest annually at the rate of six per cent.; and the court sustained the exception and referred the case back, with directions to compute at simple interest and not compound it. The plaintiff contended that it should be compounded annually; and the question for the court to decide is whether the interest should be compounded or not, and whether it shall be computed according to the legal rates of interest in this State, or according to the laws of North Carolina. The petition charges that defendant used the money from the time he came to the State, and he lent it, or could have lent it, at the rate of ten per cent., compounded annually. The answer admits he used it and lent part of it at ten per cent. The evidence shows that, from 1838 up to the time of giving their testimony, money was worth ten per cent., compounded annually, and could have been loaned all the time at that rate. All these witnesses managed money, and they say they had no difficulty in loaning at ten per cent., compounded annually. It may be contended that as defendant received his appointment as guardian in the State of North Carolina, he is not governed by the laws of Missouri, and is only bound by the rate of interest in that

State, which is six per cent., compounded annually. It may further be argued that plaintiff cannot sue here in our courts. As to that, we refer the court to the private acts of Legislature passed in 1855, art. 5, § 5 & 6, pp. 96 & 97.

Independent of that act, our courts have jurisdiction. This doctrine is well settled in Story's Conflict of Laws. (See § 506, t. p. 417.) Story and Kent both say that it is the right of the guardian to change the domicile of the ward—that he may do so though it change the right of succession. If defendant exercised this right and removed the plaintiff to Missouri with his property—and in so doing, as Story says, the right of succession and the laws of descent of this State govern his property—certainly he has a right to appeal to the laws and courts here to protect him in his property. This doctrine has been settled in Ohio. (See 8 Ohio, 227.) In this case the guardian was appointed in Pennsylvania, and received the ward's property and removed to the State of Ohio. The court decided the guardian was bound to account under the laws of Ohio, and the court say it is the doctrine in England. (See 1 Pars. Sel. Cas. in Eq. 411; 18 Martin, 69.)

The pleadings and evidence show that defendant received the effects as testamentary guardian. If so, a Court of Chancery has jurisdiction wherever he may go with the property.

Defendant, the moment he received the money of plaintiff, received it as the ward's money, and he brought it to Missouri. And what was his duty at common law? It was to loan it at the highest rate of interest; and the laws of Missouri compelled him to make annual settlements, and further directs the court to charge them with the interest annually. The statutes of Missouri direct and authorize the guardian to loan the money and take notes binding the obligors to pay the interest annually, and, if not paid at the end of the year, the interest to bear the same rate of interest as the principal. The court in this case only charges defendant with simple interest. If defendant had made his settlements annually, the court would have charged him with the interest in

each settlement. It was his duty to have made his settlements; and by his failure the court should not relieve him from his liability by his refusal to do his duty. The defendant further states in his answer, that year after year he went into the Probate Court of Platte county and had the identical accounts proven up and allowed against plaintiff, and he pleads them by way of offset in this suit. If the Court of Probate had jurisdiction to allow the accounts of defendant's offset, it had jurisdiction to settle the estate as guardian. In Missouri, the rate of interest from 1835 to 1847 was ten per cent. (R. C. 1835, p. 333, § 2, and p. 295, § 9 & 10; R. C. 1845, p. 613, § 1 & 2—also, p. 551, § 23; 1 Johns. Chy. 620-628; Wright v. Wright, 2 McCord, 203; 4 Johns. Chy. 303; 4 Vesey, 620; 2 Kent's Com. 237; R. C. 1845, p. 551.)

There is a difference in administrators and executors, and guardians, and the distinction is drawn in Story and the Ohio case above cited.

II. The court, in referring the case back to the commissioner, directs him to allow defendant a commission of five per cent. on the whole amount. He failed to make any settlement, was derelict in duty, put himself to no trouble, and has forfeited all claim for his services, and has performed none, and therefore he is entitled to no remuneration. (2 L. Cas. in Eq., part 1, p. 344; Boyd v. Boyd, 2 Grat. 125; 2 L. Cas. in Eq., part 1, p. 337.) In the same volume, part 1, the rule in North Carolina is stated, p. 339; Maryland, the rule is also stated, p. 333. Pennsylvania, the same rule. (2 L. Cas. in Eq., part 1, p. 323.)

III. The court below set aside the first report of the referee, and referred the case back to him by the following order and with the following instructions:

"It is therefore ordered and decreed that the case be remanded to the referee, with instructions to charge the defendant with the highest rate of simple interest allowed by the statute law of North Carolina while the money remained there, and after the removal of it here to charge the highest rate of interest allowed by the laws of Missouri (simple in-

terest), and allow the defendant five per cent. commission upon the whole amount at the time of settlement with the plaintiff, and the actual expenses incurred in reducing the property of plaintiff to possession; also the necessary expenses in taking care of the person of the defendant during his minority."

This order is erroneous, because:

a. The defendant should have been compelled to make annual rests, and compound the interest annually. (1 Johns. Chy. 620-628.)

b. The order directed that the defendant should be allowed a commission of five per cent. not only upon the money received by him as guardian, but also on the interest on said amount up to the time of taking the account—this interest never having been paid or accounted for in any manner whatever, so as to make it of any profit to his ward. And in fact he was not even entitled to any commission, inasmuch as he had used the money as his own in common with his other moneys and property. (See cases elsewhere referred to.)

The referee, in taking the account under these instructions given by the court, adopted a method of computation which was not only in violation of all law, but was really an outrage on rights of the plaintiff; that is to say, he charged the defendant only simple interest on the amount of money actually received by him, so as to deprive the ward of any benefit from the interest accruing on his money for over twenty years. And then he allowed the defendant interest on all amounts paid for the benefit of the ward from the time that the same was paid up to the time of taking the account. To illustrate this mode of computation, it will be seen that in July, 1840, the interest then due on the money in the hands of defendant was over two thousand dollars. At this time defendant paid for the benefit of the ward sixteen dollars. The referee allowed the defendant twenty-four dollars and ninety-four cents interest on this payment, making forty dollars and ninety-four cents, for which he gave defendant credit, when the two thousand dollars' interest due plaintiff at the time of said

payment never increased in amount one cent; and the same principle of calculation was adopted as to all other payments. It needs neither argument nor a reference to authorities to show the injustice and absurdity of such a computation.

The guardian, as this case stands, has run the ward in debt, after exhausting his money, in the sum of over three thousand dollars, which is not permitted by the law. (See the case of Wyatt, executor of Galaway, v. Wood & wife, 31 Mo. 351.)

IV. The offset of defendant next presents itself—the nineteenth exception of plaintiff to the first report of the commissioner. The defendant's items in his offset are composed of his accounts referred to in his answer, and Nos. 1, 2, 3, and 4, which have been allowed in the Probate Court of Platte county in favor of defendant and against plaintiff, in the guardianship by defendant of plaintiff in the estate of Joseph Winston. Defendant cannot take the items which have been reduced to judgment and plead them as an offset, but he may take the judgment and ask that they may be set off in this case, if defendant owes plaintiff nothing in the other estate.

The commissioner refused to permit plaintiff to show that defendant owed him in the other estate, and defendant does not pretend to show that he has finally settled the other estate, nor does he charge the fact in his answer; but he can not plead the items again, but must rely on his judgments in the Probate Court. (21 Mo. 287 & 91; Smiley v. Dewy, 17 Ohio, 159.)

The partial transcripts of defendant were improperly admitted as evidence.

The defendant is not entitled to five per cent. commission, nor is he entitled to any commission.

BATES, Judge, delivered the opinion of the court.

In 1836, James B. Frost died in North Carolina, having made his will, whereby he appointed the defendant executor thereof, and his widow Louisa and the defendant (who was

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brother of the widow) guardians of his two children, of whom the plaintiff is one.

The defendant administered the estate, which was all converted into money. In 1838 the defendant and the widow Frost removed to Missouri, bringing the children with them, and so much of the estate as was then realized, and the remainder was afterward sent to and received by the defendant. Immediately after their arrival in Missouri, William Frost died. The defendant retained the estate and applied portions of it for the benefit of the children, and, when the plaintiff became of age, paid him some considerable sums of money. The plaintiff became of age in 1855, and in 1858 he began this suit, in which, he charged that the defendant had received the estate of the plaintiff's father, one half of which belonged to him (the plaintiff), and that the defendant held it as his guardian; and admitted that the defendant had paid him several sums of money, the amount of which he did not know, and asked that the defendant should disclose the same, and that he might have judgment against the defendant for the balance. The defendant answered, and among other things insisted that he had fully paid the plaintiff.

The cause was, by agreement of parties, referred to a commissioner.

The referee having heard the cause, reported to the court an account, in which a statement is made of the receipts and payments by the defendant, the items of which are not disputed. In stating the account, the referee computed interest at the highest rate allowed by law each year upon the sum in the hands of the defendant, and added that interest to the principal, and from that sum deducted the amounts expended during the year for the ward, and also a commission which he allowed the defendant of two per cent. on the amount in his hands at the beginning of the year, and the remainder became the principal for the next year, with which he proceeded in like manner; and so of each year to the end of the account.

The result showed an indebtedness of the plaintiff to the

defendant of five hundred and seventy-five dollars and sixty-one cents.

Both parties excepted to the report, and the court being of opinion that the referee had erred in computing the interest with annual rests and additions of interest to principal, so as to compound the interest, and also in allowing the defendant two per cent. commission annually, remanded the case to the referee, with instructions to compute the interest at simple interest, and to allow the defendant only one commission of five per cent. on the whole amount in his hands.

The referee reported an account stated in obedience to the instructions of the court, the result of which showed an indebtedness of the plaintiff to the defendant of three thousand and seventy-four dollars and seventy-six cents, for which sum the court rendered judgment in favor of the defendant against the plaintiff. This judgment must be reversed. If a guardian voluntarily disburse on account of his ward a sum greater than the ward's estate, he has no recourse upon the ward for the overplus unless there be a special promise to pay it. (*Wyatt v. Woods*, 31 Mo. 351.)

In remanding the cause, it is proper to state that we are of opinion that the mode of computing the interest adopted by the referee in his first report—that is, charging it at the highest legal rate and compounding it—is the correct one. In so doing, it is proper to allow the defendant a liberal commission, because he is not only charged with the highest interest he could get for the money, but, if he have lent it out, is made a guarantor of payment. The amount allowed appears to be reasonable; but, as it is not in our province to judge of that, we must remand the cause.

At the hearing before the referee, it appeared that in 1850 the defendant had been appointed, in Missouri, guardian of the plaintiff, with a view, apparently, of his managing other property of the plaintiff, but that no such property had come to his hands as such guardian, but accounts against the ward had been allowed in his favor, and that the credits given the defendant by the referee were for the same items allowed the

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defendant in the Probate Court, and objection was made to their allowance on that account. The objection was overruled, and, we think, properly. The defendant was guardian of the whole estate of the plaintiff, and not merely of that derived from a particular source, and the allowance was a proper credit to him upon all his indebtedness as guardian.

Judgment reversed and cause remanded. Judges Bay and Dryden concur.



STATE, TO USE OF CONNELLY *et al.*, Appellants, v. THE PARKVILLE AND GRAND RIVER RAILROAD COMPANY and the COUNTY COURT OF PLATTE COUNTY, Respondents.

State—Injunction.—The State cannot properly be made a party plaintiff, at the relation of a private citizen, to a bill of injunction to restrain the County Court of a county from issuing its bonds or levying a tax to pay for a subscription to the stock of a railroad company. The State has no interest, legal or equitable, in the subject matter.

Injunction against levying tax.—An injunction will not be granted, at the instance of a tax-payer, to restrain a County Court from levying a tax, upon the ground that the court had no jurisdiction, and that its action was a nullity. It must appear that the injury to the tax-payers would be irreparable, or such as could not be redressed by action at law. (*Sayre v. Tompkins*, 23 Mo. 443, affirmed.)

Appeal from Platte Circuit Court.

Wilson & Merryman, for appellants.

The point made by the demurrer, that the suit is not brought in the name of the proper parties, is untenable. Any person who is to be affected by the unauthorized act of a public officer, may claim the protection of the government and its name, and sue by such government on his relation. (See *Story's Equity Plead.* p. 56, § 49.)

The petition charges that they have made the subscription, and are threatening to issue the bonds and levy a tax for the payment of them. This they cannot do by the charter of the railroad, until the question is put to a vote of the people.

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Under the act of 1855, and '59 and '60, and the charter of the Parkville and Grand River Railroad, the subscription cannot be made until the people pass on it. The subscription was only a conditional one before the act of 1859-60.

Clough, for respondents.

I. There is a defect of parties plaintiff, the State of Missouri not being a necessary party to this action, and improperly a party plaintiff.

II. There is a defect of parties defendant. The Parkville and Grand River Railroad Company is not properly a party defendant.

III. The petition does not state facts sufficient to constitute a cause of action, or to authorize the granting of the relief prayed for, and the demurrer was therefore properly sustained.

DRYDEN, Judge, delivered the opinion of the court.

This is a bill of injunction, brought in the name of the State of Missouri, at the relation of Connelly and others, to restrain the County Court of Platte county, as well from issuing bonds in payment of one hundred thousand dollars of stock, subscribed by said county to said railroad company on the 3d of January, 1860, as from levying and collecting a tax to pay said subscription or bonds. The ground of complaint, alleged in the bill, is that "the County Court, at the instance of the railroad company, by an order of said court, made a subscription of one hundred thousand dollars of stock to said railroad company, without causing an election to be held by the people of said county to ascertain as to whether such subscription should be made, or as to whether the same should be paid by issues of county bonds or taxation;" and that the court is *threatening* to issue bonds for the amount of the stock, and to levy and force the collection of a tax to pay said bonds. The defendants demurred, and assigned for cause, that the State was improperly made party plaintiff, and that the petition did not state facts sufficient to consti-

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tute a cause of action; and that there was no equity in the bill. The court sustained the demurrer, and judgment was rendered for the defendants, from which the plaintiff appealed.

1. There is nothing in the petition which shows or pretends to show that the State of Missouri has any interest, legal or equitable, in the subject matter of the controversy; and the suit was therefore improperly brought, and cannot be maintained in the name of the State.

2. If the County Court should do all that the bill charges it has threatened to do—issue the bonds and levy and collect the tax—it does not appear that the injury to the tax-payers would be irreparable, or such as could not be redressed by action at law; and, unless it thus appears, it is not a case for equitable relief.

The bill is based upon the assumption that the vote of the people was an indispensable pre-requisite to the action of the court; that without such vote the County Court had no jurisdiction, and its action was a nullity. If this be true, then a sale of the tax-payer's property, under the proceedings, would not divest the owner of his title, (no other considerable injury could result to the relators,) and he could maintain his action at law for the property, or for damages for taking it. And so the bill contains no equity. (*Sayre v. Tompkins*, 23 Mo. 443.) The demurrer was well taken.

Let the judgment be affirmed; the other judges concurring.

LEWIS DASSLER, Respondent, v. THOMAS WISLEY, Appellant.

Issues.—It is the duty of the court to state the issues to the jury, without referring them to the pleadings to ascertain what the issues are.

Appeal from Webster Circuit Court.

Sample Orr, for appellant.

I. The Circuit Court committed error in giving the first instruction asked by the respondent.

II. The Circuit Court erred in giving respondent's third instruction, as it is surely neither the law or the policy of Missouri to submit the pleadings to a jury, to hunt out what allegations are and what are not material. That is abstractly the law, but it is a duty of the court and not of the jury to hunt and declare them.

III. The Circuit Court committed error in refusing to give the second instruction asked by appellant, as the proof showed that appellant had sustained damage from two to four hundred dollars.

It is certainly abstractly the law that every material allegation in a petition, not specially denied by the answer, is to be taken as true, or to stand as admitted; but it is equally clear and true that the State of Missouri pays annually about twenty-five or thirty thousand dollars for the purpose of employing circuit judges to declare what charges are admitted, and what the juries are to try.

BATES, Judge, delivered the opinion of the court.

Plaintiff sued the defendant on an account for work and labor, the greater part of which was on and about the making and burning a kiln of brick.

Defendant, by his answer, avers that the work done in making and burning the brick, was so done under a special contract, whereby the plaintiff agreed to superintend the making and burning a kiln of brick for the defendant for a stipulated price per day, on condition that the plaintiff was to make for defendant "a good burn;" and if he failed to make a good burn, he was to have nothing for his time and labor. Defendant also alleged that the plaintiff agreed to make and kiln a certain number of bricks per day, and failed to do so, whereby the defendant sustained the loss of a sum named, for which he asked judgment.

Defendant alleged that the bricks were greatly injured in burning, so as to impair their value four hundred dollars, for which he asks judgment.

The defendant also asked judgment against the plaintiff upon an account for moneys paid for boarding, &c.

On motion of the plaintiff, the court instructed the jury as follows :

1. That unless they believe from the evidence plaintiff was to make and kiln six thousand bricks per day, and was to make a good burn, as stated in the defendant's answer, they will find for the plaintiff.

2. That it devolves on the defendant to prove the contract, as stated in his answer.

3. That all the material allegations in the plaintiff's petition, not specifically denied by the defendant's answer, will, for the purposes of this action, be taken to be true.

On motion of the defendant, the court gave the following instructions :

1. That if they believe from the evidence that there was a contract between the plaintiff and defendant, to the effect that plaintiff was not to receive anything from defendant if he failed to make a good kiln of brick ; and the jury believe from the evidence that said plaintiff did not make a good kiln of brick, they will find nothing for making said brick, unless the jury believe from the evidence that there was a variance in the contract.

2. The jury will find on defendant's account whatever they may think is proven in addition to what plaintiff has admitted.

The court also refused the following instruction, asked by the defendant :

"The court further instructs the jury, that they will find for the defendant, by way of damage, any amount under four hundred dollars, if they believe from the evidence defendant sustained any damage by the unskillfulness or mismanagement of plaintiff, or by intentional mismanagement."

Verdict and judgment for ninety dollars was given for plaintiff, and defendant appealed to this court.

The first instruction given for plaintiff was wrong. It connected together, as having the same effect, the contract to make and kiln six thousand bricks per day, and that to make a good burn, and wholly ignored the other items of defendant's counter-claim. The answer sets up that the plaintiff's

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work was done under a special contract to make a good burn, but does not in that connection aver that he did not make a good burn; so that the failure to make a good burn is not pleaded as a bar to the plaintiff's claim. In the counterclaim it is stated that the bricks were injured in burning so as to cause the defendant a loss; but that is no proper averment of a failure to make "a good burn." Although the jury might believe that the plaintiff was not bound to make a good burn, yet it does not follow that all the issues should be found for the plaintiff.

The third instruction given for plaintiff was obviously wrong. It is proper for the court to state the issues to the jury, but it is not proper to refer the jury to the pleadings to ascertain them, and especially to such pleadings as these.

We do not understand what is meant by "a variance in the contract," mentioned in the instruction given for the defendant; nor do we understand the second instruction.

The instruction refused the defendant, was, in the form as asked, properly refused.

The instructions seem to have been as carelessly drawn as the pleadings.

Upon the whole, this case had better be tried over again, for it seems very improbable that the jury could have had any clear understanding of the issues, and of the law applicable to them.

Judgment reversed, and cause remanded. Judges Bay and Dryden concur.

THOMAS P. RUBEY, Respondent, v. BENJAMIN HUNTSMAN,
Appellant.

Tax Sale—Deeds.—Where the statute required that the sale of lands for taxes should be made before the courthouse door of the county, and the sale was made inside the courthouse, the sale was void and no title passed by the sale and the register's deed thereupon. (Revenue, R. C. 1845, p. 949.)

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Appeal from Randolph Circuit Court.

Reid & Denny and *H. M. Porter*, for appellant.

I. It was not necessary that the sale should have taken place *before* the courthouse door to make the tax deed good. The evidence shows that the sale was made at the courthouse, which is in accordance with the notice.

The sale being made publicly, near the door, within full view of and within hearing distance of the door, was a substantial compliance with the law; and the rights of the parties could not have been affected thereby.

II. A recital of the place of sale is not required to be inserted in the deed; therefore, the recital in the tax deeds that the sale took place *before* the courthouse door does not render said sale invalid.

III. Although the tax deeds were not executed at the expiration of the two years from the date of sale, defendant was entitled to a deed at any time.

IV. The act of 1847, making deeds *prima facie* evidence of title under sales made under the act of 1845, only *changes* the burden of proof.

Burckhardt, for respondent.

I. The sale for taxes took place inside the courthouse, which was a departure from the law in a material matter, and there must be a strict compliance; and the law does not fix any limit to which they may depart without invalidating the sale. (*Reed v. Morton*, 9 Mo. 868; *Donohoe v. Veal*, 19 Mo. 331; R. C. 1845, § 95, Act concerning Revenue.)

II. The recitals in the deed are not in accordance with the facts. The deed recites that the sale took place before the courthouse door, and the evidence showed that it took place in the courthouse. (*State, ex rel. Donohoe v. Richardson*, 21 Mo. 420.)

III. The tax deed was not executed and recorded by the register for several years after the time for redemption had passed, and the law requires the deed to be made and

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recorded at the expiration of the two years, as an additional means of enabling the owner to ascertain that his land has been sold. (Reed v. Morton, 9 Mo. 868; also, § 29 of Acts of 1847, concerning sales for taxes.)

In tax sales, no title passes until the execution of deed by register. (Donohoe v. Veal, 19 Mo. 331.) The party whose land was sold being an infant, it was important that the register's deed should have been executed and recorded at the proper time, so that he would have found it out in time to redeem.

IV. There was no such adverse possession in this case as would avail anything against the rightful owner. (McDonald v. Schneider, 27 Mo. 412.)

The law requires the sale to be made publicly before the courthouse door, and if made inside, it is not such a compliance with the law as contemplated.

BATES, Judge, delivered the opinion of the court.

This is a suit for damages for trespass to land, apparently prosecuted and defended for the purpose of trying the title to the land, both parties claiming title. Judgment was given for the plaintiff. The plaintiff having shown a *prima facie* case of title, the defendant set up a title under a tax sale, and the plaintiff gave evidence tending to impeach the validity of that tax title. The defendant, to show his title, gave in evidence a deed made to him by the register of lands, dated the 11th day of February, 1857, and which was filed for record on March 2, 1857. That deed recited the sale made by the collector of Randolph county, on the first Monday of October, 1846, "before the courthouse door of said county." The plaintiff then proved that the sale was made inside the courthouse, and not "before the court house door of the county."

The court below, by instructions given, decided, in effect, that the making the sale within the courthouse, and not "before the courthouse door," was such a failure to comply with the law as to make the sale void. We think that the

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court did not err in so deciding. The 9th sec. of the 15th art. of the Act concerning Revenue (R. C. 1845, p. 949,) provides that the sale shall be made "before the courthouse door of the county." It is well established in this State that a person claiming to hold land under a sale for taxes can only maintain his title when the law has been strictly pursued. It is immaterial whether it was more convenient to all persons, or better in any respect to sell within than before the courthouse; the law has prescribed the place of sale, and that is the only proper place; and it is so because the law has said so, and there can be no reasoning about it. (Reed v. Morton, 9 Mo. 868; Donohoe v. Veal, 19 Mo. 331; State, *ex rel.* Donohoe, v. Richardson, 21 Mo. 420.)

The defendant also set up length of possession in himself as a bar to the plaintiff's right of action, but no evidence was given of actual possession by him.

The judgment of the court below is affirmed. Judges Bay and Dryden concur.



THOMAS P. RUBEY, Respondent, v. SAMUEL R. CAMPBELL,
Appellant.

Appeal from Randolph Circuit Court.

Reid & Denny and *H. M. Porter*, for appellant.

Burckhardt, for respondent.

BATES, Judge, delivered the opinion of the court.

This case does not differ materially from the case of Thos. P. Rubey v. Huntsman, and is decided upon the same principle as in that case.

Judgment affirmed. Judges Bay and Dryden concur.

Foster v. White Cloud City Co.

JAMES FOSTER, Defendant in Error, v. WHITE CLOUD CITY COMPANY, Plaintiff in Error.

Corporation—Entries—Evidence.—Where the defendant, sued as a corporation, pleaded that it had ^{not} organized under the acts of incorporation, the book of entries containing the articles of the association signed by the associates, and the record of the proceedings, was properly admitted in evidence to prove the actual organization of the corporation.

Error to Holt Circuit Court.

Ensworth, for plaintiff in error.

At the trial of this cause, the respondent offered in evidence the records of the White Cloud City Association, all made prior to the charter of the White Cloud City Company, the charter having been approved February 11, 1858, and record and articles of association made from May 11, 1857, to February, 1858, which was objected to by the defendant as irrelevant and incompetent; which objections were overruled; which opinion was clearly erroneous. The evidence should not have been permitted to go to the jury. The company had not at the making of said record any existence.

There is no evidence showing that the corporation was duly organized, and this question was erroneously taken from the jury by the instructions given on the part of the respondent.

H. M. & A. H. Vories, for respondent.

The evidence was all properly admitted. The books were proved to be the books of the company, and the entries in the books were read to show that the company had been organized as an association and as a corporation; and a great many of the entries were read for the purpose of showing that the stockholders were present and assenting to what was done. The division of the lots among the members, and the different members receiving their deeds therefor, was read for this purpose, and to show that they all recognized Bailey as their president, and all of the directors who acted with him.

The entries also showed the authority of Bailey to execute

the note sued on. After the authority of Bailey, the president of the company, to execute the note had been proved, the court permitted the note to be read to the jury, and instructed the jury that it was *prima facie* evidence of the plaintiff's right to recover. This was right. As the plaintiff had adduced sufficient evidence to the court to authorize the court to let the note be read to the jury, it was right to instruct them that it was *prima facie* evidence of plaintiff's right to recover.

As to the books of the corporation being properly admitted, see 1 Starkey by Sharwood, and notes, p. 309, and authorities cited; also, Greenl. Ev.

BATES, Judge, delivered the opinion of the court.

The petition contains two counts—the first upon a note made by the defendant to the plaintiff, and the second upon an accounting between the parties and order of the company that the note should be executed, and its execution by the president of the company. The defendant appeared, and by answer denied that at the time of the execution of the note it was a body politic and organized and incorporated. It admits the passage of the acts of incorporation, but denies that even at the time of the answer the corporation had ever organized under them. It admits the execution of the note by Osias Bailey, but denies that he was president of the company, or had any authority to execute the note. It denies the accounting with the plaintiff, and denies any indebtedness to the plaintiff, who is charged by the answer with being a member of the company.

It is a little strange that the defendant, which by this answer denies its own existence, should yet appear to the action and cause its answer to be signed by its attorneys and sworn to by its agent. Possibly this may be accounted for by the fact that the company appears to have been formed and incorporated for the purpose of speculating in the lots of a city which it proposed to create in the Territory of Kansas.

The only questions that arise are upon the admission of

testimony given by the plaintiff. It appears that an association of individuals, who afterwards procured charters from the State of Missouri and the Territory of Kansas, was formed. The plaintiff having given in evidence the acts of incorporation, offered in evidence entries made in a book which was proved to contain the articles of association signed by the associates, and a record of their proceedings, including acceptance of the charters and organization thereunder, and an order allowing the plaintiff's demand, and directing the note in question to be executed to him. The defendant objected to this testimony as incompetent and irrelevant; but its objection was overruled. We think the testimony was properly admitted. Though a great many of the entries in the book had no apparent connection with the matter in hand, yet, under the issues made by the defendant, the whole was proper to show the actual and effectual organization of the company. The defendant had denied its organization, and no better evidence could be given. No error appears in the record.

Judgment affirmed. Judges Bay and Dryden concur.

J. A. J. ADDERTON, Plaintiff in Error, v. GEORGE M. COLLIER
et al., Defendants in Error.

Practice—Judgment.—Where several are sued at law, and the defence pleaded by one is available to the others, after a verdict and judgment for the defendant pleading, the plaintiff cannot have judgment by default against the other defendants, for the reason that upon the whole record it appears the plaintiff has no right of action.

Practice—Discontinuance.—Leave to discontinue ought generally to be given a plaintiff, but the giving or refusing it is a matter of practice resting in the discretion of the court. It ought never to be given where it would deprive a defendant of a just defence.

Error to Saline Circuit Court.

The facts are stated in the opinion.

Adams, for plaintiff in error.

Addertsen v. Collier.

I. The plaintiff had a right at any time before the jury was sworn to dismiss his suit as to any of the defendants. The defendants Sarah A. and Mary A. Collier, who had been obtruded into the case, and were not necessary parties to the controversy between the plaintiff and the original defendants, had no right to compel the plaintiff, against his consent, to carry on a suit against them. (See 5 Mo. 453, *Gearhart v. Gist*; 1 Saunders, 207, in notes and cases there cited.) The plaintiff had not obtained possession of the property. It had been left in the possession of the original defendants under the bond returned by the sheriff, and therefore plaintiff had the right to dismiss as to any or all of the defendants. (See *Collier v. Hough*, 26 Mo. 152.)

II. The final judgment against George M. and Susan K. Collier was properly rendered against them and their sureties on the delivery bond, Tabb and Durrett. (Art. VII., Practice in Civil Cases, § 14, 2 R. C. 1855, p. 1245.) This judgment could not be set aside or altered at a subsequent term. (*Lindell v. Bank* Mo. 4 Mo. 228; 7 Mo. 320; 25 Mo. 351; 20 Mo. 584.)

III. The delivery bond was a part of the sheriff's return, and he cannot, nor will the parties be allowed, to dispute the return. (See *Hallowell v. Page*, 24 Mo. 590; *Page v. Page*, 24 Mo. 595; *Dillinger v. Higgins*, 26 Mo. 180.)

IV. The bond recites that Tabb and Durrett are sureties for the original defendants, and they were estopped from denying this recital; and the testimony given on the motion to set aside the judgment was not only incompetent because it contradicted the sheriff's return, but because the sureties were estopped to deny the tenor and effect of their own bond. (*Dixon v. Anderson*, 9 Mo. 155; *Marchioness of Annondale v. Harris*, 2 P. Wms. 432.)

Ryland & Son, for defendants in error.

I. There is no error in permitting the defendants Mary A. Collier and Sarah A. Collier, by consent of the plaintiff, to appear and become parties to this action. The plaintiff

claimed title to the negro girl Harriet; the defendants Mary A. and Sarah A. Collier deny his right and title, and set up their own title to the girl. The right to the negro girl could be thus tried by consent, and after defendants filed their answer, and plaintiff saw that he had no title, and no right to expect to succeed against their claim, he moved to dismiss as to them. They were properly in court; anyhow, by the plaintiff's consent they were in court, and the answer was filed and the cause properly tried, and defendants succeeded in sustaining their title and right to the negro girl. It would have been wrong after the plaintiff consented, and after the defendants had answered, to have then dismissed the suit as to them.

II. It was proper to amend the judgment, and correct the mistake of the clerk. Here were the minutes of the judge and of the clerk to correct by.

III. The only error is, that the judgment ought not to have been against George M. and Susan K. Collier, even for a merely nominal amount. The negro girl did not belong to them, and by their deed of trust they could convey no property in her to plaintiff; he, plaintiff, has not been injured. He acquired no title to the girl from George and Susan K. Collier, and when the real owners obtain a judgment for the girl, declaring their right and property in her, then no final judgment ought to have been given on the default against George and Susan K. There is not the slightest grounds to charge Mary and Sarah Collier with fraud.

IV. From the record the court cannot but see that justice has been done by the court below in correcting the mistake, and amending the judgment. The mistake occurred by the improper form which the plaintiff's attorney furnished the clerk, and then the real minutes are made to give way to the form—erasures are made to conform to the form. The court never saw this form, and never would have permitted judgment to have been rendered against Tabb and Durrett: they were Mary's securities, not George's and his mother's. No judgment is given against Mary, the principal, because she

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proves her right and title to the negro, but yet judgment is given against her securities. All this shows that something is wrong about this matter; and the plaintiff in error comes here relying on the most minute technicalities to give him money out of the pockets of Tabb and Durrett.

DRYDEN, Judge, delivered the opinion of the court.

Adderton sued George and Susan Collier for the possession of a negro girl, under the provisions of the seventh article of the practice act, R. C. 1855, p. 1242. The summons was returnable to the May term, 1858, and was duly served. Mary and Sarah Collier, two daughters of the defendant Susan, claimed the slave, and at the time of the service of the writ, they, instead of the defendants, furnished security, and gave bond to the sheriff for the delivery of the property to answer the judgment of the court at the return term. On the motion of the plaintiff, said Mary and Sarah were made defendants in the cause, and at the same term they filed their answer to the petition, denying the right of the plaintiff, and setting up their own right of possession of the property in controversy. At the next term of the court, [November, 1858,] the plaintiff filed a motion for leave to dismiss the case as to the defendants Mary and Sarah, and for a judgment by default against defendants George and Susan. The court refused leave to dismiss, but rendered the judgment by default, and continued the cause. At the May term, 1859, a trial of the issues made by the petition and answer was had, which resulted in a verdict and judgment for the defendants Mary and Sarah. At the November term, 1859, an inquiry of damages was had, in which the value of the slave was assessed at eight hundred dollars, and damages for its detention at one hundred and twenty dollars, and judgment therefor was made final against the defaulting defendants, George and Susan Collier. At the May term, 1860, the court, on the motion of Tabb and Durrett, the securities on the delivery bond, amended the record of the preceding term by striking out their names from the entry of the judg-

ment, which, it was alleged, were inserted by the mistake of the clerk, and not in accordance with the judgment of the court. The plaintiff, Adderton, duly preserved his exceptions to the various adverse decisions of the court, and the case is brought here by him and by the defendants George and Susan Collier, by cross-writs of error.

1. In the view we have taken of this case, the only ground of error complained of by the plaintiff which we need notice is the refusal of leave to discontinue the action as to the defendants Mary and Sarah.

Leave to discontinue ordinarily is, and ought to be, given a plaintiff, but the giving or refusing it is a matter of practice resting in the discretion of the court. It ought never to be given where it would deprive a defendant of a just defence. (*Kirtly v. May*, 29 Mo. 220.)

It was on the plaintiff's own motion that the parties proposed to be discontinued were made defendants. They had answered and assumed the whole burden of the defence, and the plaintiff had accepted them as his real adversaries in the case. The original defendants having no interest in the subject of the action, trusting the defence alone to those who were concerned in its success, made no answer, and suffered the time within which to answer to expire. In this condition of things, the court could not have permitted the discontinuance without wrong to the defaulting defendants, and permission was therefore properly refused.

2. The defendants George and Susan Collier assigned for error the assessment of damages against them, and making final the judgment by default after the verdict and judgment of the court in discharge of their co-defendants Mary and Sarah.

The defence made by Mary and Sarah, which resulted in the verdict and judgment for them, was not based upon any ground personally to themselves, but was equally available by the other defendants, and was such as showed that the plaintiff had no cause of action. And it is the settled law in such cases, that after verdict and judgment for the defendant

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who pleads, the plaintiff cannot take judgment against the defendants in default, for the reason that upon the whole record it appears the plaintiff has no right of action. (2 Tidd's Prac. 986 ; 2 Lord Raymond, 1392 ; 1 Levinz, 63.)

The Circuit Court therefore erred in rendering the said final judgment against the defendants George and Susan, and the securities Tabb and Durrett, and its said judgment is reversed ; the other judges concurring.

THOMAS HENRY, Plaintiff in Error, v. DAVID D. MITCHELL
and ROBERT M. RENICK, Defendants in Error.

Attachment Levy—Execution Sale.—When a tract of land has been laid out into blocks and lots, with streets and alleys dedicated to the public use, and some of the lots have been sold to third parties, an attachment subsequently levied upon the tract, by its description before subdivision, will be a nullity ; and an execution sale, under the judgment in the attachment suit, will not convey the title.

Attachment—Description—Deed.—The sheriff's return of the levy of an attachment upon land of the defendant should describe the land with as much certainty as a sheriff's deed.

Error to Buchanan Court of Common Pleas.

The facts are fully stated in the opinion.

Loan, for plaintiff in error.

I. The interest of A. M. Mitchell in the lots in controversy was liable to be seized on the attachment. (R. C. 244, § 19 ; Lisa v. Lindell, 21 Mo. 127 ; Lacky v. Seibert, 23 Mo. 93.)

In this State, the interest of a tenant in common, in any given part of the common property, is liable to be seized and sold on execution. This is an authority derived from our statute, and which is variant from the rule of the common law. If the defendant has any interest in the real estate seized on execution, however slight, it is liable to sale, (R. C. p. 470, 753, § 17, 73,) and there is no provision protecting

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the interests of co-tenants. These estates are held subject to the incidents the law attaching to them—like a partnership, where the goods of the firm are subject to be seized and sold on an execution against one member of the firm, and where it is the duty of the sheriff to divest the other partners of the possession of their goods, and deliver them to the purchasers thereof. (*Wiles v. Maddox*, 26 Mo. 77.) So tenants in common hold their common property subject to a sale of a co-tenant's interest in any and every part thereof.

II. The levy of the attachment is sufficient.

Although a plat of South St. Joseph was filed in May, 1855, showing that the whole quarter section had been laid off into lots; yet, in point of fact, the south half of the quarter had been kept enclosed with a fence, and was not staked off into lots until about the time the attachment was levied on the same. Under such circumstances, the levying the attachment on A. M. Mitchell's undivided interest in the south half of said quarter section of land is sufficiently specific, and is good. (*Rector v. Hart*, 8 Mo. 448; *Lisa v. Lindell*, 21 Mo. 127; *Scott et al. v. Hammond*, 12 Mo. 8.)

III. The levy of the execution was sufficient.

The judgment in favor of Jaccard was a general one, and at this time it was generally known that the south half of said quarter section had been laid out in lots. The execution was levied upon A. M. Mitchell's interest in the lots, describing them by their numbers and blocks; and by further describing the whole as being situate upon the south half of said quarter section of land.

IV. The sale made by the sheriff is valid.

It is objected that it did not follow strictly the levy of the attachment. The tenants in common had separated the quarter section, in 1855, into two distinct and separate parcels, the north half of which was divided into many several and distinct parcels, by laying it out into town lots, in each of which the tenants in common owned an equal individual interest. The south half remained as the whole quarter had been previously held. On this the attachment was levied to

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the extent of A. M. Mitchell's interest therein. About the time of this levy, and before a judgment was obtained against A. M. M., the tenants in common laid out the south half of said quarter section into town lots. By this act of separation or division into lots the tenants became seized of an equal undivided interest in each of said lots. At the time of levying the execution this subdivision into lots was generally known and recognized. The execution was levied upon A. M. Mitchell's interest in each of said lots, and described them in the aggregate as the south half of said quarter section of land, and advertised them accordingly and under the law.

It was the duty of the officer to sell them separately. A sale of A. M. Mitchell's interest in all the lots in the aggregate would have been irregular, and would have been set aside on motion. The sheriff could sell no more of Mitchell's property than was necessary to satisfy the execution.

V. The sheriff's deed conveyed to the purchaser all the interest that Mitchell had to the lots at the time the attachment was levied.

Under the rules of the common law, it has been decided that such a sale and conveyance would vest the property in the purchaser as between him and the execution defendant. (Bartlett v. Harlow, 12 Mass. 358.)

It was a title he was allowed to assert in a partition suit against the co-tenants of the defendant in the execution.

VI. It is assumed that under our law, that every one who must be made a party to a partition suit, under the 3d and 4th sections, p. 1111 R. C., may institute and prosecute such suit, &c. If this be true, it follows conclusively as a consequence, that if plaintiff acquired A. M. Mitchell's interest in the lots in contest, by and under the sheriff's deed, (and the court found that he did,) that he is entitled to have partition of the same.

He is entitled to have partition of the lots under the rule of the common law, which it is contended authorizes the sale of the co-tenant's whole interest, or a part of his interest, in the whole.

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By the division of the land into lots, by the consent of all the tenants in common, they thereby became tenants in common of the several lots into which the land had been divided; and the whole interest therein of each of said tenants was liable to sale on execution, or either of the tenants might have partition of one or more of said lots. (Smith v. Swearingen, 26 Mo. 557.)

Hall and Vories, for defendants in error.

I. The levy of the attachment upon the south half of said quarter section of land after the same had been divided into lots, blocks, streets and alleys, and a plat thereof had been acknowledged and recorded, was a nullity. Not only had said land been so divided at the time of said levy, but the evidence shows that the line dividing the north half and south half of said land runs diagonally through a portion of the lots laid off in the same. (Evans v. Ashley, 8 Mo. 185; R. C. 1855, § 22, chap. 12, act concerning attachments.)

II. The judgment in the case of Jaccard & Co. was a general judgment. The execution conformed to the judgment. The sheriff, therefore, was not bound to follow the attachment levy, and all the evidence shows that he did not do so. He levied the execution on certain specific lots, and only on a portion of the lots into which the south half of said land had been divided. The attachment was levied on the south half of said land, describing it by its numbers, and as eighty acres of land. In the sheriff's advertisement no allusion is made to the attachment, and his deed is equally silent. The sheriff sold, and he intended to sell, only such title to said lots as A. M. Mitchell had at the time of the levy of the execution. The bidders, who were aware of the attachment, may have supposed their deed would relate back to the attachment levy. But only a portion of the bidders knew of the attachment, and the result was, lots worth one hundred dollars, or more, were sold for twenty-five cents.

III. The defendant and A. M. Mitchell were tenants in common, at the time of the levy of the attachment, in all the

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lots, numbering several hundred, into which the whole of said quarter section had been divided. Neither of them had the right to have any particular lot partitioned. Their right was to have all of the lots partitioned. A sale by one of said tenants of his interest in any specific lot would have been void as to his co-tenants, and the sheriff could sell nothing which the tenant could not sell himself. (*Bartlett v. Harlow*, 12 Mass. 348; *Smith v. Benson*, 9 Vt. 138; *Howe v. Blandon*, 21 Vt. 315; 1 *Greenleaf's Cruise*, 402, note 1; 4 *Kent's Com.* 387, § 64; *Blason v. Bright*, 21 Pick. 283; *Peabody et al. v. Minot et al.*, 24 Pick. 329; *Baldwin v. Whiting*, *Spear et al.*, 13 Mass. 57; *Starr v. Leavitt*, 2 Conn. 246; *Jewett's lessee v. Stockton*, 3 Yerger, 492; *French et al. v. Lund et al.*, 1 N. H. 42; *Walker's American Law*, p. 305; *Stanford v. Fullerton*, 6 Shepley, 130; 1 *Hilliard on Real Prop.*, 593, et seq.)

IV. Under our statute the right to partition is incident to a tenancy in common. Neither tenant can defeat that right, nor can the creditors of any tenant do this. Notwithstanding the suit of *Jaccard & Co.* against *A. M. Mitchell*, his co-tenants had the right to have a partition of their common property. They might have partitioned it by suit without making *Jaccard & Co.* parties. Indeed, according to *Hull v. Lyon*, 27 Mo. 577, 571, *Jaccard & Co.* could not have been made parties to such a suit. Now, as *A. M. Mitchell* could have been compelled, by action, to make partition of the property notwithstanding the attachment suit of *Jaccard & Co.*, he had the right to make partition without an action, for a person may always do voluntarily what the law will compel him to do by suit. If the partition between defendant and *A. M. Mitchell* was fair and honest, it is valid against plaintiff. Partition can be made by tenants in common notwithstanding the levy of an attachment upon the interest of one of the tenants. (*Barrington v. Clarke*, 2 Penn. 115, by Pen. & Wat.; *Jackson v. Pierce*, 10 John. 414; *Wilkinson v. Parrish*, 3 Paige, 653; *Curley v. Allyn*, 5 Greenl. 456; *Randell v. Mallett*, 2 Shep. 53; *Brown v. Bailey*, 1 Met. 257; *Gregory v. Tozier*, 24 Me. 309.)

V. There is no pretence that Jaccard & Co. were injured by the partition made by defendants and A. M. Mitchell. The sheriff's return on the execution shows that he levied on and sold, under said execution, only a portion of the lots situate on said south half of said quarter section. On reference to the deeds of partition, it will be seen that a number of lots on said south half were conveyed to A. M. Mitchell that were levied on under said execution. Said lots last mentioned were worth a good many times the amount of the Jaccard judgment. The lots on said south half not sold by sheriff and conveyed by D. D. Mitchell to A. M. Mitchell, are all the lots of block 51, seven in number; all the lots of block 59, seven in number, and all the lots of block 55, fourteen in number. The whole number of lots assigned to A. M. Mitchell on said south half is one hundred and nineteen; and besides this, about two acres in a reserved block, as appears from the partition deeds and plats in evidence.

BATES, Judge, delivered the opinion of the court.

On the 15th of May, 1855, Alexander M. Mitchell, D. D. Mitchell, and Robert M. Renick, were the owners of a quarter section of land adjoining the city of St. Joseph, in Buchanan county, and laid out the same into blocks and lots, with streets and alleys intersecting and separating the same, as an addition to the city of St. Joseph, called South St. Joseph, and on that day filed in the office of the clerk of the Circuit Court of Buchanan county a plat of the same, and thus dedicated to public use the streets, alleys, and public grounds marked thereon.

On the 29th April, 1857, Jaccard & Co. sued A. M. Mitchell in the St. Louis Circuit Court by attachment. The writ issued to the sheriff of St. Louis was personally served on A. M. Mitchell, and he appeared to the action and answered; and upon a counterpart to Buchanan county, the sheriff of that county attached the undivided interest of the defendant in "the south half of" said quarter section, describing it by the number of section, township and range. On the 2d

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day of November, 1858, in said cause a general judgment was rendered against A. M. Mitchell for six hundred and eighty-one $\frac{50}{100}$ dollars, with general award of execution. A general execution was issued to St. Louis county, and returned *nulla bona*, and on the 7th day of July, 1859, a general execution was issued to Buchanan county, upon which was endorsed by the clerk "sell property levied on by virtue of attachment, viz., undivided interest of Alexander M. Mitchell in and to the south half of the southeast quarter of section 17, T. 57, R. 35, containing 80 acres."

The sheriff's return on the execution shows that he levied the execution upon a great number of lots, describing them by the numbers of the lots, and of the blocks in which they were situated, "on the south half of" said quarter section, describing it; and that he had sold them to different named persons, including certain lots sold to the plaintiff; and the sheriff made a deed to the plaintiff for the lots sold to him, dated 24th September, 1859. None of the proceedings of the sheriff under the execution refer to the levy under the attachment. The plaintiff claims title under that deed to one undivided third part of the lots described in it.

On the 5th of June, 1857, D. D. Mitchell (who represented and held the interest of Renick as well as his own) and A. M. Mitchell made a partition of the lots held by them, and executed to each other deeds, so as to vest in each the whole title to the lots conveyed, and A. M. Mitchell, by means of the deed executed by him in carrying out that partition, conveyed his interest in the lots in dispute to D. D. Mitchell.

In this suit D. D. Mitchell claims the whole title to said lots, and denies that the plaintiff has any right therein.

It appeared at the trial that when the levy under the attachment was made, a number of the lots in the addition, but within the northern half of the quarter section, had been sold, and houses had been built upon some of them. It appeared, also, that a line dividing the south from the north half of the quarter section would run diagonally through a long row or tier of the lots as laid out.

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It will be perceived from the above statement, that in order to make the plaintiff's title good it must date back to the levy of the attachment. The first question, therefore, to be considered, is the validity of the levy under the attachment. We have no hesitation in declaring that, under the circumstances above stated, that levy was a nullity. The levy must describe the land with as much certainty as a sheriff's deed. Here was a quarter section of land which had been owned by three tenants in common, who had divided it all up into blocks and lots, with streets dedicated to public use separating the blocks, and with some of the lots sold to third persons and occupied by them; and the sheriff levies upon the undivided interest of one of the tenants in common in a distinct portion of the land originally held in common, by a description only appropriate to its original state, when its state had been so changed that it was no description at all of the existing lots. The sheriff might just as well have described it as the south half of the city of St. Joseph.

Other questions were discussed in the cause, but as this one finally disposes of the whole case, they will not be noticed.

Judgment affirmed. Judges Bay and Dryden concur.



JOHN HALL, Appellant, v. PHILIP HUFFMAN, Respondent.

Evidence.—In a suit by the landlord against his tenant for breach of covenant of the lease to cultivate the land in a husbandlike manner, evidence was properly admitted to prove that the lease was executed on a different day from that stated in the instrument.

Appeal from Atchison Circuit Court.

This action was brought by Hall against Huffman to recover damages for the non-performance of covenants or agreements on the part of Huffman, contained in a lease of ground made by said Hall to Huffman.

The petition charges that Hall, on the 1st day of March,

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1859, rented to Huffman, by a written agreement, seventy-five acres of land (which is described), for the term of one year from the 1st of March, 1859, for the yearly rent of one third of the corn, and one third of the oats, and one half of the wheat raised by Huffman on the premises, to be paid and delivered at Hall's crib in due time, which said rent Huffman agreed to pay, and also to cultivate said crop in a husbandlike manner; that Huffman entered upon and cultivated said land, planting fifty acres thereof in corn; that Hall duly performed all of the conditions of said lease on his part, but that Huffman had failed on his part, in this: that he failed and refused to deliver to Hall one third part of the corn raised, and that he had failed to cultivate said corn in a husbandlike manner, so much so that said fifty acres of land planted in corn only produced twenty-five hundred bushels of corn and no more, when, if the same had been properly cultivated, it would have produced thirty-seven hundred and fifty bushels; that the part of the corn actually raised on said land, which was coming to Hall by said contract, or lease, was eight hundred and thirty-three bushels, which was worth twenty-five cents per bushel; wherefore he charges that he has been damaged, &c., and that he has also sustained a loss by reason of the improper cultivation of said corn; whereby he charges that he was damaged in the further sum, &c.

The defendant in his answer admitted the execution of the lease and renting of the land, but denied that the plaintiff had performed the agreement on his part, and, traversing the allegations of the petition, denied that he failed to cultivate the land in a good, husbandlike manner; denied that the said fifty acres of land planted in corn produced only twenty-five hundred bushels of corn, &c.

The cause was tried by a jury, and upon the trial the court, notwithstanding the objections thereto, permitted the defendant to prove by witnesses that the written lease or agreement sued on did not bear date on the day that it was written, but that it was written at a later date than it purported to have been on its face. The plaintiff excepted. The court

also permitted witnesses on the part of the defendant to prove that the ground rented was in bad condition at the time it was rented; and also that defendant did not move upon the rented premises until May, 1859, to all of which the plaintiff at the time objected. Evidence was given on each side tending to prove the amount of corn raised on the land cultivated in corn, and the quantity delivered to plaintiff; and also the manner in which the corn had been cultivated.

The plaintiff then moved the court to instruct the jury that the pleadings of the cause admit that defendant, on the fifty acres of corn ground of plaintiff, raised as much as twenty-five hundred bushels of corn, of which amount he was bound to deliver one third part thereof to plaintiff, which instruction was refused by the court, and the plaintiff excepted.

The court then gave the following instructions on the part of the plaintiff:

1. That it devolves on defendant to show that he has delivered the one third part of said corn so raised.

2. If the jury believe from the evidence that defendant failed to deliver to the plaintiff the one third part of the corn raised by him on the said rented ground, they will find for plaintiff, and assess his damages at the value of said corn which he failed to deliver; and if they further find that said farm was not cultivated in a husbandlike manner, they will allow plaintiff an additional amount which might have been produced by said cultivation, giving to plaintiff one third in value thereof.

The defendant then moved the court to instruct the jury as follows:

1. That if they believe from the evidence that defendant cultivated the ground rented of plaintiff in a husbandlike manner, and delivered to the plaintiff one third of the corn raised on said ground, they will find for the defendant.

2. That if they believe from the evidence that plaintiff, or persons in and by his consent—his employ—wilfully put down the fences and permitted his, plaintiff's, stock to run

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upon and destroy the corn of defendant, then plaintiff must bear his part of the loss occasioned thereby.

3. The burden of proof is on the plaintiff, and he is bound to prove the facts necessary to entitle him to recover, except the delivery of one third of the corn to plaintiff.

H. M. & A. H. Vories, for appellant.

I. The court improperly permitted the defendant to prove that the lease or agreement upon which the suit was brought was executed on a day different from its date, and was at the time dated back to a time anterior to its date.

There was no issue made in the pleadings to authorize the introduction of such evidence, and its introduction could only be intended to either weaken or destroy the obligations of a written instrument which stood admitted and unimpeached by the pleadings.

II. The court below also erred in permitting evidence to go to the jury on the part of the defendant, to show the condition of the rented land at the time that defendant rented it. There was no issue made in the pleadings that would authorize such evidence.

III. The first instruction asked on the part of the plaintiff was improperly overruled by the court. The petition alleges that the fifty acres of land planted in corn produced no more than twenty-five hundred bushels of corn; that plaintiff's share of said corn so raised would be eight hundred and thirty-three bushels of corn; and that he sustained damages as well by the non-delivery of the corn actually raised, as by the failure of the defendant to cultivate the corn in the proper manner. To these allegations the defendant in his answer denies that he failed to cultivate the land in a good manner, and denies that said fifty acres of land cultivated in corn produced *only* twenty-five hundred bushels of corn. The answer not only fails to deny that plaintiff's portion of the corn raised was eight hundred and thirty-three bushels, but by implication asserts that it exceeded that amount. These allegations not having been denied by the answer, stood ad-

mitted upon the record, and the jury ought to have been so instructed. (R. C. 1232, § 9, 12; *John D. Dare v. Pacific Railroad*, 31 Mo. 480; *Wells et al. v. Pike*, 31 Mo. 590.)

IV. It is admitted that the first instruction given by the court, on the part of the defendant, would be proper if the court had also given the first instruction asked by the plaintiff. The jury ought to have been told, in connection with this instruction, that the amount of corn raised was fixed or admitted by the pleadings at not less than twenty-five hundred bushels. (Authorities above referred to.)

V. The second instruction given by the court on the part of defendant is erroneous, and tends to plaintiff's injury in this: that the jury are instructed by it in such a confused manner that they might infer that plaintiff was liable for what persons in his employ might do, notwithstanding he did not consent to their acts, and said acts not done in the performance of the business relating to their employment.

VI. The court clearly erred in giving to the jury the third instruction on the part of defendant.

1. The facts necessary to be proved in order to entitle the plaintiff to recover is a matter for the court, and not for the jury. The court should tell the jury what facts are required to be proved, and then it is for the jury to find whether said facts have really been proved. In this instruction both questions are submitted to the jury. (*Fugate et al. v. Carter*, 6 Mo. 267; *Hickey v. Ryan*, 15 Mo. 62.)

BATES, Judge, delivered the opinion of the court.

One of the issues was whether the land had been cultivated in a husbandlike manner; and in respect to this issue it might have been very important to show the time when the agreement was made between the parties, and also the condition of the land when received by the defendant. The court therefore properly admitted the testimony in reference to these subjects.

The court properly refused the instruction asked by the plaintiff, that by the pleadings it was admitted that the de-

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fendant raised as much as twenty-five hundred bushels of corn. The allegation of the petition is that the defendant did not raise more than, to-wit, twenty-five hundred bushels. The plaintiff evidently did not mean to be bound to a particular, definite amount, and cannot claim that the defendant should answer the allegation as specifying a definite amount. The denial by the defendant is a negative pregnant, but is a sufficient denial of so indefinite an allegation. The allegation and denial together amount to just nothing.

No error is perceived in the instructions given, and they put the case fairly to the jury.

Judgment affirmed. Judges Bay and Dryden concur.

STATE OF MISSOURI, USE OF BUCHANAN COUNTY, Respondent, v.
JOSEPH B. SMITH *et al.*, Appellants.

Payments, application.—Where the collector of the revenue, in his settlement with the County Court, had settled his account, as made out by the county clerk, without objection, he admits that the payments have been properly applied, and his securities will be bound thereby. (S. C., 26 Mo. 223.)

Appeal from Buchanan Common Pleas Court.

H. M. & A. H. Vories, for appellants.

Even if the money could have been appropriated, as it was by the court, as between the original parties, that is, as between the sheriff and the county, yet the law does not permit such an appropriation when it will interfere with the rights of securities or other third parties who are to be affected by the transaction. (See authorities above cited; also *United States vs. January & Patterson*, 1 Cranch, 572; *United States v. Eckford's Ex'rs.*, 1 Howard's U. S. C. C. R. 250.) This last case covers every point in this case, and is worthy of particular attention.

The securities in the bond sued on undertook that Smith should collect and pay into the treasury of Buchanan County

the revenues for the years 1854 and 1855. The evidence shows that this was done in the proper time. It is therefore contended that the sureties were discharged as soon as the money was paid in, and that the sheriff and County Court could not change their condition by afterwards applying the money collected and paid of the revenue of said years to a previous default. (For which, see above authorities.)

J. M. Bassett, for respondent.

I. It cannot be successfully questioned in this case but that Buchanan County credited Smith with the full amount paid into the county treasury. The real question is as to the application of the payments made by said collector. The law will make no application of said payments unless the debtor and creditor have both failed to apply them in a proper manner. It is not contended that the County Court, or its clerk, or the treasurer of said county, knew from what source Smith obtained the money that was applied to the defalcation on the bond of 1852-3. Smith, the collector, did know, and if he did, in fact, divert a portion of the revenue of 1854-5 to extinguish a defalcation on his collector's bond of 1852 & 3, and the county received the money in good faith, and entered satisfaction of the accounts under the bond of 1852-3, the appellants are responsible. (See authorities below cited.)

II. In this case, the application and appropriation of said payments was made a question of fact, and fairly submitted to the jury under the instructions for plaintiff, and particularly under the seventh instruction given for plaintiff.

III. Smith adopted the application of said payments as made by the agents of said county, and thereby made said application his own act; and if he consented to a misapplication of said revenue, and the agents of the county to settle with said Smith were not aware of an improper diversion of said revenue, then said appellants are liable. The doctrine of the application of payments where two sets of securities are concerned, and where the law must interfere and apply payments because the persons interested have made no such applica-

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tion, it is respectfully urged has no application to this case. (State, to the use of Buchanan County, v. Smith *et al.* 26 Mo. 226; Inhabitants of Colerain v. Bell, 9 Metcalf, 499; U. S. v. Kirkpatrick, 9 Wheat. 720; Seymour v. Van Slyck, 8 Wend. 403; 11 Barbour's Sup. Ct. 90; 9 Cowen, 747, 420; 15 Wend. 19; 3 Denio, 285; Burge on Suretiship, 123, 130; Mayor of Alexandria v. Patton, 4 Cranch, 316; 4 Mason, 335.) No person is authorized to settle with the collector but the County Court. (R. C. 1845, p. 308.)

Gardenhire, J. B., for respondent.

There was no error in refusing to instruct, that, in the absence of any application of payments at the time they were made, the law *conclusively* applied them to the indebtedness of the term during which they were made. Where a legal application of payments has been made, one of the parties alone cannot change it, but it may be changed by the assent of both. (25 Maine, 29.) Where a creditor applies a payment known to the debtor, and he acquiesces in it, it is conclusive upon him. (11 Barb. Sup. Ct. 80.) Payments are to be applied according to the understanding of the parties, when that can be ascertained at any time before controversy, and it may be implied from circumstances. (2 Har. & Gill, 159; 13 Vt. 15; 5 Watts & Serg. 542; 3 Watts & Serg. 550; 7 Blackf. 236; 5 Gilman, 449.)

BATES, Judge, delivered the opinion of the court.

This suit was brought against Smith as principal, and the other defendants as securities, on the bond of Smith, as collector of revenue in Buchanan county for the two years next ensuing the first of September, 1854. The petition assigned several breaches of the condition of the bond, which were substantially the same, to the effect that Smith had collected some nine thousand dollars for Buchanan County more than he had paid over to the county, or otherwise legally accounted for.

Smith failed to answer, and the other defendants answered, traversing the alleged breaches of the condition of the bond.

At the trial, it appeared that Smith had been collector of the revenue for the two years previous to the years covered by this bond, and had given bond for those years (1852 & 3) with a different set of securities; and that at the time the bond in suit was given, Smith was in default for sums which he collected of the revenue for 1852 & 3, and had not paid over; and that after this bond was given, he paid to the county several sums of money which were applied to the extinguishment of his debt for the years 1852 and 1853. The contest in the case is as to whether the sums so paid were properly applied. This case was heretofore before this court, and is reported in 26 Mo. 226. The principles stated in the opinion then delivered governs the case as now presented.

It now appears that the collector from time to time paid into the county treasury sums of money of county revenue, without giving any directions as to how they should be applied, and that the treasurer, in fact, made no application of the sums so paid, but gave the collector credit for the sums so paid as on account of county revenue, without specifying the year for which they were received, and gave the collector receipt for the same sums "on account of county revenue;" that the collector, on depositing the treasurer's receipts with the county clerk, gave no directions as to their application, and the clerk in his accounts applied the payments for which receipts were deposited with him, to the settlement of the oldest indebtedness of the collector. It does not appear with certainty that the collector knew of such application, though as to the last sum so applied, it appears that the collector asked the clerk what was the balance against him for the year 1853, and having been told, he went out, and immediately returned with the treasurer's receipt for the precise amount, which he deposited with the clerk. Upon the final settlement made by the collector with the County Court, the application of these sums made by the county clerk was adopted without anything being said either for or against it

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by either party. No person representing the plaintiff knew from what source Smith got the money. The application was thus fully made by the proper parties, and binds the sureties of collector, and upon the verdict judgment was properly given against them in the court below.

Judgment affirmed. Judges Bay and Dryden concur.



ANDREW COUNTY, Plaintiff in Error, v. OLIVER H. P. CRAIG
et al., Defendants in Error.

Swamp Lands—Tender of Deed.—By the fourth section of the act concerning swamp lands (Acts 1850-1, p. 239), the county is not required to tender a deed before demanding or suing the purchaser of such lands for the amount due upon his purchase.

Error to Andrew Circuit Court.

Aikman Welch, attorney general, for appellant.

I. The court erred in refusing to give the third instruction asked for plaintiff, and also in giving the instruction which it did on its own motion. This instruction given by the court is erroneous in this—that it denies the plaintiff's right of recovery on the bond sued on; first, unless plaintiff had a title "before the maturity of the note;" and second, unless plaintiff had tendered a deed "before the institution of the suit." Both of these propositions are erroneous. On the first proposition, see *Johnson v. Purvis*, 1 Hill, S. C., 208; *Martin v. Bobo*, 1 Spears, S. C., 26; *Thomson v. Miles*, 1 Esp. 183; 1 Sugd. on Vend.; *Gregson v. Riddle*, before Lord Thurlow, 1784, cited 7 Vesey, 267.

On the second proposition, see the above authorities and also *Bailey v. Clay*, 4 Rand., Va., 346; Serg. Wms.' note in *Pordage v. Cole*, 1 Sand. 320; *Leftwitch v. Coleman*, 3 How., Miss., 167; *Rector v. Price*, 6 Ala. 321; *Lucas v. Clemens et al.* 7 Mo. 367; *Guest v. Homfray*, 5 Vesey, 818, 823.

But the instruction is also erroneous in this—that it excludes from the jury all consideration of the question of a waiver by the respondents of any right to insist on plaintiff having a title by the maturity of the note, a right which respondents insist upon in their answer and the court in its instruction (but erroneously), when there was abundant evidence of such waiver then before the jury and unexcluded; since, although the note matured July 6, 1858, yet the petition avers, and the respondents admit by not denying, a payment on said note by respondents on the 22d day of March, 1859, of \$120.83, which is nearly one year *after the maturity of the note*, thus waiving any right to claim a forfeiture of the contract, at least up to the time of such payment, by reason of plaintiff's supposed failure to obtain title by *the maturity* of the note. (Langford v. Pitt, 2 P. Wms. 630; Coffin v. Cooper, 14 Vesey, 205; Seaton v. Steele, 7 Vesey, 265; The Dutch Church v. West, 7 Paige, 37; Brown v. Hoff, 5 Paige, 235; Winne v. Raymond, 6 Paige, 407; Cotten v. Ward, 3 Monr. 313; Jones v. Robbins, 29 Me. 351; Boehm v. Wood, 1 Jac. & Walk. 420; Levy v. Linde, 3 Meriv. 81; Hunter v. Daniel, 4 Hare, 420.)

II. The intention of the parties, as gathered from the entire transaction, is the first rule in the construction of contracts; other rules are subservient to this, and, when they contravene it, are to be disregarded. (Gray v. Clark, 11 Vt. 583; Kelly v. Mills, 8 Ham. 325; Patrick v. Grant, 2 Shep., Me., 233; Morey v. Homan, 10 Vt. 565; Hollingsworth v. Fry, 4 Dallas, 345.)

H. M. & A. H. Vories, for respondents.

There are three exceptions taken by the plaintiff in this case, and yet there is but one point involved necessary to be considered by this court, which is: Was it necessary for the plaintiff in this case to have tendered a deed to the defendants for the lands which formed the consideration of the bond upon which the suit was brought? It is insisted by the defendants that this was necessary, and the court below so in-

structed the jury. If this instruction was right, there is no pretence of an error in the case.

In order to a proper understanding of this case, the bond sued on and the certificates of purchase read in evidence must be construed as one instrument. When thus construed, it will be found that the purchase is a conditional purchase, the condition being that the defendants will pay the money upon the condition that the county obtain title to the land; otherwise, the bond is to be void.

The defendants contend that the true construction of this is, that the county should obtain the title before or at the time the bond becomes due; and although there is no express promise or covenant on the part of the county to convey to the defendants, yet in effect it is a promise to convey the title to the purchasers at the time that the money is to be paid. And hence the plaintiff, to recover, should allege in his petition and prove on the trial—

1. That she, at the time the bond became due, had procured a good and sufficient title to the lands.

2. That she had either conveyed or offered to convey the lands to defendants; in other words, that the contract of the defendants to pay the money, and the covenant or promise of plaintiff, were concurrent dependent promises or covenants. (For which, see *Magaw v. Lathrop*, 4 Watts & Serg. 316; *Chit. on Cont.*, t. pp. 745, 747, 748 & 749, and notes and cases cited; *Cunningham et al. v. Morrell*, 10 Johns. 203; *Freeland v. Mitchell*, 8 Mo. 487; *Fletcher v. Cole*, 23 Vt. 114; *Syme v. Steamboat Indiana*, 28 Mo. 335.)

DRYDEN, Judge, delivered the opinion of the court.

This is a suit for the debt and interest remaining unpaid on a bond given by the defendants for five thousand eight hundred and eighty-seven dollars and seventeen cents, payable at twelve months, to the County of Andrew, for the price of certain swamp lands sold to the defendants Craig and Abney by the sheriff, under an order of the County Court. At the time of the sale the sheriff executed to the purchasers

certificates of purchase, by which he stipulated (without any authority whatever, so far as appears) to the effect that if the county failed to get a good title to the lands, the bond for the purchase money, as well as the certificates of purchase, were to be void.

The defendants answered, setting up the agreement evidenced by the certificates of the sheriff, and denying that the county had acquired any title to the lands, or any of them, and insisting there was a failure of the consideration of the bond. Another ground of objection to the plaintiff's recovery, urged in the answer, is that the plaintiff had not, before the institution of the suit, made or offered the defendants any deed for the lands so sold.

On the trial, the bonds and certificates were read in evidence. The plaintiff also read a list of lands, including those sold, certified by the secretary of State to the clerk of the Andrew County Court, as swamp lands of said county, which was shown to have been filed by the clerk in his office on the 22d of May, 1858, before the bond became due.

At the close of the evidence, the court, of its own motion, instructed the jury in effect, that, although the plaintiff had shown a good title to the lands sold, yet, inasmuch as there was no evidence to show that the plaintiff had made or tendered a deed to the defendants for the said lands before the institution of the suit, the plaintiff could not recover. The plaintiff, on the giving of said instruction by the court, of necessity suffered a non-suit, which she afterwards moved to set aside; but the motion was overruled, and the case is brought here by writ of error.

The only question in the case is involved in the instruction: Was the tender of a deed prior to the bringing of the suit necessary to enable the plaintiff to maintain its action? The principle upon which the instruction of the court is based, however applicable to ordinary contracts made under the general law of the land, has no application to cases like the one at bar. The sale of the lands in this case was under a special law, applicable to an isolated class of property, with

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rules for the conveyance of the title defined and peculiar to itself; and parties purchasing property under it must be held to have made their contracts in subordination to its provisions. By the provisions of an act concerning swamp lands, approved March 3, 1851 (Sess. Laws 1850-1, p. 238), power is given the County Courts to order their sheriff to sell. By the fourth section of the act, p. 239, it is enacted that "*when-ever full payment shall be made for any of said lands by the purchaser thereof, the County Courts shall cause the same to be certified to the governor, who shall thereupon grant to the purchaser, his heirs or assigns, a patent for the same, which patent shall be signed by the governor, countersigned by the secretary of State, and be recorded in the office of the secretary of State.*"

The county was under no obligation to make or tender a deed before suit brought, and the instruction was therefore erroneous, and the non-suit ought to have been set aside.

The judgment of the Circuit Court is reversed and the cause remanded, with directions to proceed with the case in conformity with this opinion. Judge Bates concurs. Judge Bay did not sit in the case.



ROBERT SALLEE, Respondent, v. WILLIAM ARNOLD *et al.*, Appellants.

Guardian and Ward.—The possession of the goods and chattels of the ward by the guardian, is the possession of the ward. He acts in a merely fiduciary capacity, and is the agent of the ward in all matters relating to the trust property.

Husband and Wife.—Where a female ward marries, the marital rights of the husband attach to the goods and chattels of the ward in the possession of the guardian, and he may demand and recover the same although the wife die before he obtain the actual possession.

Bailment.—If the guardian hire out the slaves of the ward, the possession of the bailee is, as between guardian and ward, the possession of the guardian.

Appeal from Callaway Circuit Court.

Knott & Hough, and *Ryland & Son*, for appellants.

I. The question in this case is whether the slaves of an infant *femme*, which have been hired out by her guardian before the marriage, pass to her husband *jure marito* where the marriage and the death of the wife both take place during the term, and while the slaves are *de facto* in the possession of the lessee; and the affirmative of this proposition can only be sustained on the hypothesis that the possession of the guardian is the possession of the ward, and that the possession of the lessee is the possession of the guardian, even where the hiring is for a definite time and upon a valuable consideration. This theory is utterly incapable of support in reason or law, the well settled principle being that the general property draws to it possession *only in cases where there is no intervening adverse right of enjoyment*; and when the general owner has conveyed to another the exclusive right of present enjoyment and possession of a personal chattel, the *possession is in the lessee or bailee*, and he may maintain trespass even against the owner of the reversionary interest for an injury done to the property before the expiration of his lease. (2 Gr. Ev. § 614; *ibid*, § 616; 1 Ch. Pl. 169; 8 Johns. 435; 2 Pick. 122; 11 Johns. 156; 3 Scammon, 10; *Anderson v. Kincheloe et al.*, 30 Mo. 520.)

This principle, that the possession of a personal chattel hired to one for a certain term, and upon a valuable consideration, is the possession of the bailee or lessee, and not of the owner of the reversionary interest, is supported by the simplest deductions of common reason; for the bailee who has hired the property for a price, has a vested title to the beneficial use and enjoyment of it, for which he has contracted and paid. Recognizing the correctness of the doctrine that the possession of the hired chattel is in the lessee for the term, Mr. Justice Ewing, in the case of *Anderson v. Kincheloe & Dickerson*, above cited, in which it was decided that the lessee of slaves for a year could transfer possession to

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another, and that other maintain an action against the owner of the reversionary interest for depriving him of possession of them, remarks that, "the hiring for a year being shown, and the *delivery of possession pursuant thereto* being admitted, Gratz (the lessee of the slaves) *was the owner of the slaves* for that period, and held them with all the rights incident to that kind of special ownership."

II. In order to entitle a party to maintain trespass for an injury to property he must have *possession*, for the very gist of the action is the injury to plaintiff's possession; but it is settled beyond controversy that, if the general owner part with his possession to a bailee, and the bailee have the right to the exclusive use of the thing at the time the injury was committed, the *general owner cannot support trespass*. Therefore, the general owner is regarded in law as not having possession. (1 Ch. Pl. 169; Roussin v. Benton, 6 Mo. 592; 8 Pick. 235; 4 T. R. 489; 7 *ibid*, 9; 5 Vt. 274; 9 Cowen, 687; 9 Metcalf, 233; 1 Johns. 511.)

III. If, then, the doctrine as laid down in the authorities be correct, that the possession of the lessee or bailee of a personal chattel who has the right to the exclusive use thereof during the time for which he has hired it, is *not* the possession of the general owner, it follows that the possession of Nunnelly, the bailee in this case, was *not* the possession of Lydia Ann Swearingen, nor of the guardian Arnold. Even granting it to be true that the possession of the guardian is the possession of his ward, but that she had simply a right to possession in reversion, and further, that the cases of Whitaker v. Whitaker, 1 Dev. 310, and Granbury v. Mehoon, *ib.* 456, relied upon by respondent, are not authority in this case, because they proceed solely upon the erroneous theory that the possession of the lessee or bailee entitled to the exclusive use of the slaves, is the possession of the general owner. The other cases relied upon by respondent are not analagous. There had been no intervention of an adverse right of enjoyment in either of them.

IV. The possession of the slaves in controversy being in

Nunnelly, (the lessee,) and not in Lydia Ann Swearingen at the time of her marriage, and not having been reduced to possession by Sallee, her husband, before her death, but remaining until that time in Nunnelly, Sallee has no right to them, for marriage is a gift to the husband only of such of her personal estate as is in possession of the wife; and as to her choses in action, or mere rights to receive money or property, the law only gives the husband a right to them on condition that he reduce them to possession during coverture. (Leakey v. Maupin, 10 Mo. 372; Wood v. Simmons, 20 Mo. 370.)

V. The slaves in controversy were not only never in possession of Sallee during his wife's life-time, but he did not even have a present right of action to recover them; the right of action was future, and would necessarily remain so until the expiration of Nunnelly's lease. (See cases of Walker v. Walker, 25 Mo. 367; Leakey v. Maupin, 10 Mo. 368; Wood v. Simmons, 20 Mo. 363.)

Ansell and Gardenhire, for respondents.

On the facts agreed the law is with the plaintiff—

I. Because personal property of a female ward in the possession of her guardian, is not a chose in action but property in the possession of the ward, and on her marriage vests *eo instanti* in the husband. (Chambers v. Perry, 17 Ala. 726; Magee v. Toland, 8 Porter's Ala. 36.)

II. The fact that personal property is held by the guardian in common for several wards does not reduce the interest of each to a chose in action; but as to each, it is regarded as property in possession. (17 Ala. 726.)

III. Where personalty remaining in the hands of a former guardian of a femme covert came into the possession of her husband, who was her administrator after her death, it was held that the marital right attached. (Davis v. Rhame, 1 McCord's Ch. 191, 193.)

IV. Where the slave of a femme sole was hired for a year, during which time she married, and her husband died, the

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slave was held to vest in the personal representatives of the husband. (Whitaker v. Whitaker, 1 Dev. 310; Granbury v. Mehoon, 1 Dev. 456; Pettijohn v. Bensley, 4 Dev. 512.)

V. Where the wife before marriage was a joint tenant of slaves, which went into the possession of her co-tenant in the wife's life-time, *held*, that this was such a possession by the wife as that the marital rights of her husband would attach, the possession of one joint tenant being the possession of another. (Burgess v. Heape, 1 Hill's Ch., S. C., 404.)

VI. Marriage is, by law, an unqualified gift to the husband of all the personal estate of the wife in her possession at the time of its taking place; and if he should die an hour after the marriage, having received a large personal estate from the wife, all that estate, except what our law allows to her as dower, would go to the kindred of her husband, and not to the wife. But as to choses in action, or mere rights to receive money or property from another, the law only gives the husband a qualified right to them, viz., on condition that he reduces them to possession during coverture; and if he fails to do this, if the wife survive, she will be entitled to them. (Leakey, adm'r, &c. v. Maupin, 10 Mo. 372.)

VII. If personal property of the wife, other than choses in action, be in such a situation that the husband may lawfully take it into his hands at any moment, this is a sufficient reduction into possession, although he should not take it into his actual custody. (Walker v. Walker, 25 Mo. 367.)

VIII. A husband is not entitled under our statutes to the choses in action of his wife not reduced into possession during her life. As where the wife, being entitled to a distributive share of her father's estate, died before the same was received by the husband, he is not entitled to such share, but the same will go to her heirs. (Gillett v. Camp, 19 Mo. 404.)

IX. In the case of Walker's administrator against Walker, the court remarks: "As to the point that the property, other than choses in action, never was reduced into possession during coverture, we are of the opinion that it is unsustained by the law arising from the facts of the case. In contempla-

tion of law, property is reduced into possession when it is in such a state that the husband can lawfully take it into his hands if he will. It is not necessary that he should have actually taken it into his custody; if he has a right to do so at his will, it is enough," &c. If the property was in the possession of the wife, then the possession of the wife was the possession of the husband. (*Walker's adm'r v. Walker*, 25 Mo. 375.)

X. Where a father by will gave to his son a slave until the slave attained the age of twenty-one years, and the remainder of the life of the slave to his daughter, then a married woman; held, that the right of the husband to the slave was perfect on the assent of the executor to the legacy; that the possession of the tenant of the particular estate was the possession of the tenant in remainder, and that the right to the slave survived to the husband upon the death of the wife before the termination of the particular estate. (*Pitts v. Curtis*, 4 Ala. 350; 3 Litt. 275, 283-4.)

XI. Personal property is divided into things in possession or in action, and property in things in possession is either absolute or qualified.

XII. A bailment is a qualified, limited or special property in a thing capable of absolute ownership.

Neither the bailor nor the bailee of a personal chattel has an absolute property in the chattel. The property of both is qualified, and each of them is entitled to his action if the goods be damaged or taken away—the bailee on account of his possession, and the bailor because the possession of the bailee is immediately his possession.

XIII. A chose in action is any right to damages, whether arising from the commission of a tort, the omission of duty, or the breach of a contract. (*Magee v. Toland*, 8 Porter's Ala. 36.)

XIV. The right of a husband in the slaves of his wife, which are hired out at the time of the marriage, is not a mere chose in action. She was the general owner of the property, in which the hirer has a mere special interest. Upon the mar-

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riage, the title is vested in the husband, if not absolutely, at least *sub modo*; so that upon the death of the wife, before the termination of the interest of the bailee on hire, he became entitled to it as survivor. (Morrow v. Whitesides, 10 B. Mon. 412; Banks v. Marksbury, 3 Litt. 275, 283-4; 10 B. Mon. 412.)

XV. Possession of lands by a guardian in socage is the possession of the ward; the possession of the bailee is the possession of the bailor, and the possession of the guardian is the possession of the ward.

The possession of the guardian of an infant female ward is the possession of the ward; and if the ward marry, the possession, *eo instanti*, is transferred to the husband, and the bailment is then in possession of the husband in point of law, as much as it could afterwards be by actual manucaption.

The actual enjoyment of a chattel which accrues to the wife before marriage, is not necessary to vest her interest in the husband.

If a chattel be found and not converted to the use of the finder, or if it be hired, or loaned, or otherwise bailed, it does not thereby become a chose in action; and if it belong to a woman who marries, her right immediately vests in the husband—at least so far as, if she dies, it will survive to him. (8 Porter's Ala. 36, &c.)

BAY, Judge, delivered the opinion of the court.

Plaintiff brought suit against the defendants in the Callaway Circuit Court to recover possession of seven slaves—Prudence, Greene, Creed, Amanda, Laura, Margaret, and an infant, name unknown—of the value of thirty-two hundred dollars. The cause was submitted upon an agreed statement of facts, as follows:

“Prudence, Greene, and Creed, originally belonged to the estate of Thomas Swearingen, deceased, of Montgomery county, in this State, who died in the year 1850. Letters of administration were taken out upon his estate, and in 1854 commissioners were appointed by the County Court of Mont-

gomery county to divide the slaves of the intestate among his widow and heirs, and the slaves Prudence, Greene and Creed were assigned to Lydia Ann Swearingen, a daughter of the said Thomas Swearingen.

“William Arnold, one of the defendants, was the guardian of the person and estate of the said Lydia Ann, she being a minor, and took possession as such guardian of said slaves, Prudence, Greene and Creed. Arnold was also guardian of two other minor heirs of the said Thomas Swearingen, and took possession of the slaves assigned them by the commissioners at the same time, and gave one bond. The other slaves mentioned are the children of Prudence, born since Arnold took possession. On the 1st of January, 1855, Arnold, as guardian of Lydia Ann, hired said slaves to Nunnely, one of the defendants, for one year, for their victuals and clothes.

“On the 15th of May, 1855, the plaintiff married the said Lydia Ann, and on the 29th of August following she died. The slaves sued for were in the possession of the defendants before and at the time of the commencement of the suit, and while so in possession of the defendants and before the commencement of the suit were demanded by the plaintiff of defendants and they refused to give them up.”

Upon the above statement of facts, the court found for the plaintiff; whereupon, defendants filed their motion for a new trial, on the ground that the finding of the court was not warranted by the facts, which motion was overruled and defendants appealed to this court.

The question arising in this case upon the foregoing facts is, “What interest in the slaves did the plaintiff acquire by virtue of his marriage?” Was the interest of Lydia Ann, at the time of her marriage, property in possession, or was it a mere chose in action? If the former, then the marriage operated as a gift to the husband and the title vested in him; if the latter, then the husband only acquired by the marriage the right to reduce such chose in action into possession during

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the coverture. Upon the determination of these questions depends the right of the plaintiff to recover in this action.

The elementary law writers define a chose in action to be a thing of which one has not the possession, or actual enjoyment, but only a right to it, or a right to demand it by action at law. (2 Black. Com. 396, 397.) Kent defines it to be a personal right not reduced to possession, but recoverable by suit at law. Thus it is said money due on a bond, note or other contract is a chose in action, for a property in the money vests whenever it becomes payable; but there is no possession till recovery by course of law, unless payment be voluntarily made. So damages for breach of covenant for detention of chattels, or for torts, come under the title of choses in action. If these are not reduced into possession by the husband during the coverture, it is clear he acquires no right to them.

In the case under consideration, we are of opinion that the right of Lydia Ann in the slaves was a chose in possession, and not a chose in action. The estate of Swearingen had been fully administered, and the slaves in controversy allotted to Lydia Ann by commissioners duly appointed for that purpose. Her distributive share had, moreover, passed into the hands of her guardian, and it is well settled that the possession of the guardian is the possession of the ward. He acts in a mere fiduciary capacity, and is the agent and representative of his ward in all matters relating to the trust property. Nor does the fact that he had hired the slaves for a year to Donnelly affect the question in anywise, for Donnelly was a mere bailee, and the possession of the bailee is the possession of the bailor. There was no adverse claim on the part of Donnelly. He had no property in the slaves, but a mere right to enjoy the use of them for a limited period. It was a right perfectly consistent with the claim and property of the ward. If we are right in these views, then the possession of Donnelly, in contemplation of law, was the possession of Arnold, the guardian, and the possession of the guardian was the possession of Lydia Ann, his ward; and

upon the marriage of Lydia Ann her possession was transferred to her husband, the plaintiff in this suit.

In this view of the law, we are amply sustained by authority. The case of *Magee v. Toland*, 8 Porter's Ala. 36, is directly in point, and in every feature identical with this. The controversy related to a slave, the property of one Jane Carnathan, a minor, which was in possession of her guardian, George Hays. On the 1st of January, 1835, Hays hired the slave to Magee for one year, and the slave was delivered to him. On the 11th of June, 1835, Jane intermarried with the plaintiff Toland, and in August following she died. Neither Jane or her husband ever had the *actual* possession of the slave. Upon this state of facts, the court held that the possession of Magee, the bailee, was the possession of Hays, the guardian, and the possession of Hays was the possession of his ward, Jane, and upon the marriage of Jane her possession passed, *eo instanti*, to her husband, and the property vested absolutely in him. The same doctrine is recognized in *Chambers v. Perry*, 17 Ala. 726; *Sausing v. Gardner*, 1 Hill, S. C., 191; 3 Litt., Ky., 275; 1 Wash., Va., 39; *Davis v. Rhame*, 1 McCord, Chy. R. 195; *Armstrong v. Simonton's adm'r*, 2 Murphy, N. C., 351; *Morrow v. Whiteside's exec'r*, 10 B. Mon. 411. In *Sausing v. Gardner*, 1 Hill, S. C., the court held that where a slave was allotted to the wife in part of her share of the estate, but left in the care of the executor, the marital rights of the husband attached, although he never had actual possession.

Such a concurrence of authority from States in which the institution of slavery exists, and in which cases of this kind so frequently occur, leaves but little doubt as to the correctness of the rule.

The other judges concurring, the judgment of the court below will be affirmed.

Gentry Co. v. Black & Seat.

GENTRY COUNTY, Appellant, v. BLACK & SEAT, Respondents.

Practice—Nonsuit.—Where the plaintiff needlessly takes a nonsuit, the Supreme Court will not relieve him.

Practice—Evidence.—Where an instrument sued upon is set forth in the petition and admitted in the answer, it is not error in the court to refuse to allow the instrument to be read as evidence upon the trial.

Appeal from Gentry Circuit Court.

Welch, attorney general, for appellant.

Lewis & Shambaugh, for respondents.

DRYDEN, Judge, delivered the opinion of the court.

The appellant sued the respondents on the following bond:

“ Twelve months after date, we, or either of us, promise to pay to the County of Gentry, in the State of Missouri, the sum of six hundred and fifty-four dollars, with ten per cent. interest from date till paid; it being the sum for which the following described tracts of swamp or overflowed lands were sold, by order of the County Court for said county, to Adam Black, one of the undersigned, at the courthouse door in the town of Athens, on the fourth day of December, 1855, to-wit: [Here follows the description of the three tracts sold, and the rate per acre at which each sold.] Now, if the title to said tracts of land, or any of them, shall be confirmed to said county as such swamp or overflowed lands, then this bond to be valid and remain in full force and virtue in proportion to the amount confirmed to said county, and to be null and void in proportion to the amount not confirmed to said county. Witness our hands and seals, this 14th day of December, A. D. 1855.

ADAM BLACK, [L. S.]

JASPER SEAT, [L. S.]

BENJAMIN L. UROE, [L. S.]”

The petition, after setting out the bond and its condition in due form, contains this averment, viz: “ Plaintiff alleges

that the title to all said tracts of land has been confirmed to said county, and that said county is ready and willing to convey the same to the purchaser thereof upon the payment of said purchase money," but alleges nonpayment, and asks judgment for debt and interest.

The bond and the condition thereof, as stated in the petition, are expressly admitted by the answer, but it denies that the title to the lands, or any of them, was confirmed to the county *within twelve months from the date of the bond*.

In this condition of the issues, the parties went to trial, when the plaintiff (for what purpose we cannot say) offered the bond in evidence, to the reading of which the defendants objected (for what reason the record does not show); and, their objection being sustained by the court, the plaintiff thereupon voluntarily suffered a nonsuit, which the court afterwards refused to set aside; and the rejection of the evidence and the refusal to set aside the nonsuit are assigned for error.

The court committed no error either in rejecting the bond or in refusing to set aside the nonsuit. The bond was distinctly admitted by the answer; there was no issue in the cause which it in the slightest degree tended to prove; and while we cannot see that its introduction could have done the defendants any harm, it is plain it could do the plaintiff no good. The real controversy between the parties had relation to the confirmation, or rather to the *time of the confirmation*, of the title of the lands. Before this point was reached, before the court had committed any error or made any decision affecting the result of the trial, the plaintiff needlessly took a nonsuit. In such case, this court has no power to relieve. The nonsuit must stand. In the present position of the case, we cannot with propriety give, and therefore forbear giving, any opinion upon the merits.

Let the judgment be affirmed; Judge Bates concurring. Judge Bay absent.

DICKERSON *et al.*, Defendants in Error, v. CAMPBELL *et al.*,
HEIRS OF HATTER, Plaintiffs in Error.

Administrator's Deed.—The deed of the administrator upon a sale of the land of a decedent under order of a Probate Court, does not pass any of the personal rights of the administrator to the land sold, but only the interest of the decedent.

Equity—Notice.—The clerk of a Circuit Court in which a suit for specific performance of a contract for the sale of land is pending, thereby has notice of the nature of the claim of plaintiff.

Error to Howard Circuit Court.

The facts are sufficiently stated in the opinion.

Douglass & Hayden, for plaintiffs in error.

I. If the defendant in error, or his heirs, now that he is dead, is entitled to any relief whatever (which is denied), it is not such as is declared by the judgment of the Circuit Court in the case. It is unquestionably true that the assignment of a land certificate, when so intended to operate by the parties, is a sufficient memorandum in writing to satisfy the statute of frauds and entitle the assignee to call for a conveyance of the land. (See *Halsa v. Halsa*, 8 Mo. 303.)

II. Howard is a *bona fide* purchaser of the land in controversy; and, by his purchase at a public judicial sale, without notice of the contract between Dickerson and Hatter, acquired a good title to the same, free from any lien or encumbrance that Dickerson might have had before the sale. The only testimony in the case in reference to notice is the admission of Howard that Dickerson proclaimed at the time of the sale that he claimed the land; but whether as vendee, mortgagee, or lessee, was not stated. (See *Le Neve v. Le Neve*, 2 L. C. in Eq., Pt. 1, p. 111-117; 1 Hill. Vend. & Pur. 408; 1 Sto. Eq., § 400; 4 Kent, 189; *Bassett v. Nosworthy*, 2 L. C. in Eq., Pt. 1, p. 76, and authorities referred to.)

III. Dickerson is estopped from asserting title to the land in controversy. He was administrator of Hatter's estate,

and, as such, privy in law to it; was a party to the proceedings instituted by a creditor in the Probate Court of Moniteau county to sell the land for payment of debts. He made the sale; reported it to the court; but did not, if he had any interest in the land, state in his affidavit to the report what his interest was, as required by art. 3, § 33, tit. Adm'n, R. C. 1855, p. 147. Howard became the purchaser at the price of \$398. Dickerson received the purchase money and made Howard a deed. He did not resist the proceedings had in the Probate Court, and took no appeal from its judgment as he had the privilege of doing, and would have done had he felt himself aggrieved by it. The judgment rendered was binding upon him, and he has no right, in a collateral proceeding like the present, to disturb it. His acts throughout exhibit great inconsistency. He at one time has no title to the land; at another time he claims as mortgagee; and finally acts as auctioneer in the sale of the land, without making any legal claim to it whatever. If not guilty of fraud, he was guilty of the grossest negligence, and is not entitled to the aid of a court of equity. That he is estopped from claiming title to the land, and that the judgment rendered by the Circuit Court is wholly wrong, see 20 Mo. 460; Dickson v. Anderson, 9 Mo. 155; Taylor v. Zepp, 14 Mo. 482; 11 Mo. 118; Duchess of Kingston's case, 2 Smith's L. C. 507, and following.

IV. Dickerson was a creditor of Hatter's estate, and proved his demand against it, which was placed in the seventh class. The land was sold by order of the court for the payment of debts—for the payment of Dickerson's debts among others. He made the sale, received from Howard the purchase money, and appropriated to the payment of his own debt part of the money. Now, with what kind of conscience can he ask a court of equity to deprive Howard of both the money and the land? A court of equity certainly will not lend its aid to enforce the claim of a suitor who has exhibited such rapacity, and has been guilty of such fraud and gross neglect as is shown by the evidence in this case. Dickerson has no more

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right to deprive Howard of the title acquired by him, or to question its validity, than a creditor under a deed of assignment, who has received his dividend, would have to question the validity of the deed of assignment; the principle in both cases is the same. As to this point, see *Gatzwiller v. Jackson*, 23 Mo. 173, 174; *Adlum v. Yard*, 1 Rawle, 163.

G. T. White, for defendants in error.

I. The cause being tried by the court without a jury, and no instructions asked, this court cannot interfere even where it is brought up by appeal. (See *Kurlbaum v. Roepke*, 27 Mo. 161.)

II. No exceptions were taken during the progress of the trial, as the statute requires; and there being no jury, a writ of error does not reach the question as to whether the court below erred in granting a new trial or not. (See *R. C.* 1855, p. 1264, § 27; *Bancroft v. Browning*, 27 Mo. 235; *Davis v. Scripps*, 2 Mo. 187; *Little & Noecker v. Nelson*, 8 Mo. 709; *Fugate & Kelly v. Main*, 9 Mo. 355; 8 Mo. 303.)

III. A purchaser is estopped from denying notice if he receive notice before he pays over the purchase money. (*Wallace v. Wilson*, 30 Mo. 335.)

Howard was notified of Dickerson's claim in two ways; either is sufficient:

1. In February, 1859, Dickerson filed his petition in the office of which Howard was clerk, asking the title of the land to be decreed to him, and Howard swore him to it. (1 *Sto. Eq.*, § 405-6.)

2. In September following, at the time of the sale, Dickerson notified him that the land was his. (See *Bartlett v. Glascock et al.*, 4 Mo. 62; *Vaughan v. Tracy*, 22 Mo. 415.)

If Howard had the hardihood to bid and buy in all the right, title and interest which Hatter, at the time of his death, had in the land (and this is all the administrator assumed to sell, as his report shows), after being twice notified by Dickerson that Hatter had no title, this should not divest

Dickerson of his right. He could not appeal from the order of the Probate Court for the sale of Hatter's interest in the land.

BATES, Judge, delivered the opinion of the court.

This suit was brought by Dickerson against the widow and heirs of Hatter, deceased, on the 28th February, 1859.

The petition stated that the plaintiff had purchased of Hatter, in his life-time, certain land, and paid in full for the same, and that Hatter had, by writing, assigned to the plaintiff the receiver's duplicate receipt for the price of the land entered by him, to the plaintiff—no deed being then made for reason of inconvenience, and that no deed was ever made; and prayed a conveyance of the land to the plaintiff. Plaintiff was also administrator of Hatter's estate. After the suit was brought, Howard petitioned the Probate Court for the sale of the real estate of Hatter's estate, and the court ordered this real estate to be sold, and it was sold by the plaintiff as administrator of Hatter, and a deed made by him as such to Howard.

The plaintiff gave notice at the sale that he claimed the land as his own. Howard was also clerk of the Circuit Court in which this suit was brought. Howard appeared in this suit and was permitted to defend the same, and filed an answer denying the allegations of the petition.

The case was heard by the court below and determined in favor of the plaintiff, and judgment entered vesting the title in the plaintiff.

At the hearing, evidence was given to prove the allegations of the petition and of Howard's answer, and also to impeach the veracity of plaintiff's principal witness.

The record does not show any error committed by the Circuit Court. It was the best judge of the credibility of the plaintiff's witness, and there may be sufficient evidence to support the finding if the testimony of that witness be disregarded.

Howard had full notice not only that the plaintiff claimed

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the land, but also (by means of the pendency of this suit in the court of which he was clerk) of the exact nature of his claim.

Plaintiff's deed, as administrator of Hatter, did not pass to Howard any of his personal rights in the land, but only such rights as the estate of Hatter had in it.

Judgment affirmed. Judges Bay and Dryden concur.



STATE, Defendant in Error, v. MARTIN EDWARDS *et al.*, Plaintiffs in Error.

Crimes.—To constitute the offence of disturbing religious worship, under the Act, R. C. 1855, p. 630, § 30, it must appear that the acts charged as constituting the offence took place when the congregation were assembled for worship.

Error to Christian Circuit Court.

The defendants were indicted at the September term for the year 1860, of the Christian Circuit Court.

The indictment contains two counts, the first charging defendants with disturbing a congregation met for religious worship, and founded on the 30th section of the 8th article of the act concerning crimes and their punishment. (R. C. 1855, vol. 4, p. 630.) The second count is founded on the 15th section of the 7th article of said act, (p. 620,) and charges defendants with disturbing the peace of certain families in said county.

The defendants appeared and demurred to the indictment; but the court declined to pass upon the demurrer. The circuit attorney entered a *nolle prosequi* as to the second count. A jury was called and a trial had, which resulted in a verdict of guilty.

The court gave the following instructions on behalf of the State:

1. If the jury believe from the facts and circumstances in proof in this case, that the defendants, in the county of Chris-

tian, within one year before the finding of this indictment, were guilty of rude behavior, or were guilty of making a noise, or were guilty of using profane language, within a place of worship or near such place of worship, whereby an assembly of people met for religious worship, or any portion thereof were disturbed, they must find the defendants guilty on the first count in the indictment; if the jury further believe that such act or acts were either wilfully, or maliciously, or contemptuously done.

2. Wilfully signifies intentionally, not accidentally.

3. Circumstantial testimony is legal testimony, and wherever such testimony satisfies the minds of the jurors to a reasonable certainty of the guilt of the accused, such testimony is then sufficient to warrant a conviction for the highest crimes known to the laws.

4. Malice in law denotes a wrongful act done intentionally, without just cause or excuse.

5. To constitute the offence in this cause, it is not necessary that the assembly of people should be engaged in religious worship when the disturbance takes place. It is sufficient if the assembly have met for religious worship.

To these instructions defendant objected.

The defendants then filed their motion in arrest of judgment, which was overruled, and the defendants excepted.

Welch, attorney general, for the State.

I. The court did not err in overruling the motion of defendants to set aside the verdict and the motion in arrest of judgment. If different felonies or misdemeanors be stated in several counts of an indictment, no objection can be made to the indictment on that account in point of law. In cases of felony, the judge, in his discretion, may require the State to select one of the felonies, and confine herself to that. But this is only putting the State to her election. The indictment will still be good. But this practice has never been extended to misdemeanors. (1 Chitty's Crim. Law, 95; 2 Campb. 132; 5 Burr, 984; *Redman v. State*, 1 Blackf. 431; *Commonwealth v. Gillespie*, 7 Serg. & R. 469.)

Neither is it any sufficient ground to set aside the verdict in the cause, or to arrest the judgment upon the first count of the indictment, in which the defendants are charged with a disturbance of religious worship, several acts of disturbance are alleged.

The offence consists in the disturbance of a congregation met for religious services, and the different acts committed by the defendants in making such disturbance are only the means to that end, and evidences of the offence charged. If these different acts, making such disturbances, are alleged in any count in the indictment to have been committed at any one time and place, such count is not bad for duplicity. (1 Arch. Crim. Prac. 95 & 96; 2 Burr, 983; State v. Porter, 26 Mo. 206.)

BATES, Judge, delivered the opinion of the court.

The indictment contained two counts: the first for a disturbance of public worship, and the second for riotously disturbing the peace of families. The defendants demurred to the indictment. The circuit attorney entered a *nolle prosequi* as to the second count of the indictment, and the court refused to decide the demurrer, and compelled the defendant to go to trial.

The court erred in refusing to decide the demurrer. The remaining count of the indictment was good, and the demurrer should have been overruled.

The evidence preserved in the record shows that the acts charged as constituting the offence of disturbing a congregation or assembly of people met for religious worship, took place at a camp meeting, at night, after the congregation or assembly had dispersed, and the people had retired to their places of temporary abode. In remanding the case, it is proper to say that the acts committed at that time did not constitute the offence charged in the indictment.

Judgment reversed, and cause remanded. Judges Bay and Dryden concur.

Mitchell v. Fulbright.

ALLEN MITCHELL, Plaintiff in Error, v. SAMUEL FULBRIGHT,
Defendant in Error.

Limitations—Sheriff.—An action against a sheriff upon a liability incurred by the doing of an official act, or by the omission of an official duty, is barred by failure to prosecute within three years. (R. C. 1855, p. 1048, § 4.)

Execution—Practice.—The statute of limitations may be set up by the sheriff as a defence to a motion for judgment against him under sec. 67 of the act respecting executions, R. C. 1855, p. 751, without being specially pleaded.

Error to Greene Circuit Court.

The appellant here obtained a judgment against John McHenry in the Greene Circuit Court, in 1855, for one hundred and ninety-seven dollars and eighty-one cents, and execution therefor was issued from the office of said Circuit Court directed to the sheriff of said county of Greene, and returnable to the March term, 1856, of said court. At that time the respondent here was the sheriff of the county of Greene. The respondent levied said writ of execution on certain real estate situate in the city of Springfield, as the property of the said McHenry. At the term of the court to which said writ was made returnable, the respondent exposed said real estate to sale, and one Joshua Bailey bid five hundred dollars for the same; and he being the highest bidder therefor, the same was stricken off to him. The said Bailey, after having purchased the same, refused to pay the purchase money therefor, and the respondent so made his return on said execution.

Subsequently, at the August term, 1859, of said Greene Circuit Court, the appellant filed a motion for said court to enter up judgment against the respondent for the amount of the judgment that the appellant had against the said McHenry.

The said motion was by the court overruled, and appellant excepted.

Sample Orr, for appellant.

The return of the officer shows that he levied on and sold lots 43 and 44, block 14, in the city of Springfield, as the prop-

Mitchell v. Fulbright.

erty of John McHenry, the defendant in the execution, and that Joshua Bailey bid it off at the sum of five hundred dollars, but refused to pay the money. This showing of said sheriff by his return makes him liable to appellant, whether he ever collected the money or not. (R. C. 1855, p. 751, § 67.)

It is fair to infer everything against the return of a sheriff which a departure from the statute will warrant. (Blanton v. Jamison, 3 Mo. 39.)

In an action against a sheriff for failing to make return of an execution, the burden of proof is on the sheriff; the plaintiff is not compelled to prove the allegations in his petition or motion, that the sheriff did not make return of the execution according to the command thereof. (See State, to the use of Sublette & Campbell, v. Metton et al., 8 Mo. 417.)

If the sheriff relies on a statement of the facts for a return, it must be equivalent to *nulla bona*, or it will not justify or protect him. Should he levy on property by mistake as the property of the defendant, when in fact it was the property of a stranger, that might excuse him. In this case the only excuse he makes is, that Joshua Bailey bid off the property and refused to pay the money; but does not pretend that any other person claimed the property, or that the defendant did not own other property in his county. It was his duty to have resold said property forthwith before making any return, and recover the difference or deficiency, if any, by motion before any court having jurisdiction. (See R. C. 1855, p. 147, § 49.) The statute gives no remedy to any other person than the sheriff. The plaintiff could bring no action against the bidder; and if the endorsement on the execution in this case is a justification to the sheriff, can it not also be plead in bar to any other execution issued on the same judgment? (Denton et al. v. Livingston, 9 John. 96.) There is nothing in respondent's brief. He says respondent returned the facts; if so, it amounts to no return. As to the plea of limitation, I suppose this court will not adjudicate on a point not raised before the lower court.

Johnson v. Prewitt.

As it must be manifest to this court that the Circuit Court ought to have given judgment against said sheriff, I shall ask that such judgment be rendered by this court as the court below ought to have rendered. (See Practice in Civil Cases, R. C. 1301.)

Parsons, for respondent.

I. The court below very properly overruled the motion of the appellant. The respondent made his returns on the execution of the court below in conformity with the facts. There was no evidence offered below in contravention to the facts stated by respondent in his return on the execution.

The record plainly shows that if respondent did incur a liability as the sheriff of Greene county, by the omission of an official duty, as alleged by appellant, he was not liable when this action was instituted; for the right of action of appellant, if he had any right at all, did not accrue within three years next before the commencement of appellant's action, and hence it was barred by the statute of limitations. (2 R. C. 1855, p. 1047 & 1048, § 1 & 4.)

BATES, Judge, delivered the opinion of the court.

This proceeding is barred by the act of limitation. (R. C. 1855, title Limitation, Art. 2, § 4, p. 1048.) It being a summary proceeding by motion, in which no form of pleading is prescribed, we cannot require that the act of limitation shall have been formally pleaded.

Judgment affirmed. Judges Bay and Dryden concur.

LYCURGUS L. JOHNSON *et al.*, Respondents, v. DAVID PREWITT,
Appellant.

Conveyances.—Under the act of 1804, 1 T. L. p. 47, § 8, it was not necessary that the officer taking the proof by the subscribing witness of the execution of the deed by the grantors, should certify that the witness was known to him.

Johnson v. Prewitt.

Limitations—Possession.—Where a party enters into the possession of land claiming title by deed, his possession by law will be co-extensive with the boundaries stated in his deed.

Possession adverse—Limitation.—The possession of land which bars the legal title must be a hostile possession.

Appeal from Linn Circuit Court.

Prewitt, for appellant.

I. The deed of Stout to Smelser could not be read in evidence, unless the certificate shows that the party acknowledging the deed was personally known to the officer taking it to be the person making the deed. The deed was not certified, proved or acknowledged according to any law in force at the time.

II. If a deed can be read as an ancient deed, the party must show possession or acts of ownership to correspond. (Greenl. Ev. § 141-145; R. C. 733, § 58.)

III. The court erred in giving the first instruction of plaintiffs, and in refusing the first and third asked by defendant. Plaintiffs' instruction confines the defendant to the land actually occupied by him, no matter how much he possessed. Defendant's first instruction, which the court refused, declared that defendant was entitled to the whole land if he had been in possession of the whole for the requisite time; and the defendant's third instruction, which was refused, explained what was a possession of the whole.

The question raised is whether the statute bars the plaintiff as to all the tract claimed under Yount's deed, and over which defendant had exercised the usual acts of ownership, or only the part enclosed and actually occupied by defendant; and the court held the latter proposition to be the law, and the jury so understood it. We believe the statute and the decisions of this court to have declared the contrary. (Sess. Acts of 1847, p. 95, § 5; Shultz v. Lindell, 30 Mo. 370.)

Lander & Mullins, for respondents.

Johnson v. Prewitt.

DRYDEN, Judge, delivered the opinion of the court.

This is an action of ejectment to recover possession of one hundred and sixty acres of land in Linn county.

The answer of the defendant to the plaintiffs' petition puts in issue the heirship and right of possession of the plaintiffs, and also sets up the statute of limitations of ten years. On the trial, the plaintiffs read a patent from the United States to David Stout, of 4th of January, 1819, for the land in controversy; also a deed from the patentee, Stout, to Peter Smelser, of the 31st of July, 1819; and also a deed of 26th of January, 1820, from Smelser to David Johnson, the ancestor of the plaintiff.

The defendant gave evidence tending to show that one John Yount, prior to 1840, opened a field of considerable size, and made an improvement on the tract in controversy. The defendant then read in evidence a deed to himself from said Yount for said tract, of date 1st February, 1840, and gave evidence tending to prove that he entered into possession under this deed, and has possessed and cultivated the same as his own ever since.

When the deed from Stout to Smelser was offered in evidence, the defendant objected to its being read, on the ground that it was not sufficiently proved. The objection was sustained by the court, and the plaintiff then offered it as an *ancient deed*, and the defendant again objected; but this objection was overruled, and the deed was read.

The deed is attested by two subscribing witnesses, viz., Wilson L. Corall and Jacob Smelser. The certificate of proof at the foot of the deed is as follows, viz:

"MISSOURI TERRITORY, }
St. Charles county, } ss.

"Before me, the judge of the Northern Circuit of the Territory aforesaid, this day came the above named Jacob Smelser, who made oath that David Stout and Mary Stout signed the above deed in his presence, and delivered it as their act.

"Given under my hand, November 3d, 1819.

N. B. TUCKER."

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The court, at the instance of the plaintiffs, instructed the jury as follows, viz :

1. That if the jury believe from the evidence that plaintiffs or any of them are the legal heirs of Daniel Johnson, and that said Johnson had a regular chain of title from the General Government, and that defendants have no legal title, then the jury will find for the plaintiffs for so much of said land as has not been actually occupied by defendant for ten years next before the commencement of this suit, or according to their interest therein as it appears from the evidence ; and on showing the extent of defendant's possession the weight of proof is on him.

The defendant then asked the four following instructions, the second and fourth of which were given by the court, but the first and third were refused, viz :

1. If the jury believe from the evidence that the defendant was in actual possession of the whole of the tract of land in controversy for ten years next before the commencement of this suit, they will find for the defendant the whole of the tract of land in controversy.

2. Uninterrupted and ten years' actual possession since February, 1847, enables the party in possession to hold real estate against all persons.

3. The possession of a part of a tract or lot of land in the name of the whole tract claimed, and exercising during the time of such possession the usual acts of ownership over the whole tract so claimed, shall be deemed a possession of the whole of such tract.

4. The jury will find for the defendant for such part of the tract of land as they shall find him possessed of for ten years next before the commencement of this suit.

As might have been expected under the circumstances, the jury returned a verdict for the plaintiffs for " all the land in suit not enclosed." Judgment followed the verdict, from which the defendant appeals, and assigns for error the admission of the deed in evidence from Stout to Smelser, the

giving of the instruction asked by the plaintiffs, and the refusal of the first and third asked by the defendant.

1. We think the certificate of proof appended to the deed of 1819 was a substantial compliance with the law of 1804, under which it was made, and that the deed was admissible in evidence without further proof of its execution. The following is so much of the act of 1804 as bears upon this question :

1 Terr. Laws, chap. 6, § 8, p. 47—"All deeds and conveyances which shall be made and executed within this district, of or concerning any lands, tenements, or hereditaments therein, or whereby the same may be any way affected in law or equity, shall be acknowledged by one of the grantors or bargainors, or *proved by one or more of the subscribing witnesses to such deed*, before one of the judges of the general court, or before one of the justices of the Court of Common Pleas of the district where the land conveyed lies," &c., &c. [Afterwards amended, conferring same powers on judges of the Circuit Court.]

It will be observed, this law (unlike the law now in force) did not require the officer taking the proof to show by his certificate that he was acquainted with the subscribing witness. The proof of the execution of the deed being sufficient, it is unnecessary to examine the question whether, under the evidence, the deed was admissible as an *ancient deed*.

2. Where one entered into land under a conveyance (whether it conveys a valid title is not material) his seisin is not limited to his actual possession, but it is co-extensive with the boundaries stated in such conveyance. (Ang. on Lim. § 400; Shultz et al. v. Lindell et al. 30 Mo. 310.)

The instruction given for the plaintiffs in this case is based upon the erroneous motion that the defence of the statute of limitations is in all cases limited to the land in the actual possession of the adverse possessor. This would have been well enough as to a mere *intruder* prior to the adoption of the 5th sec. of the 1st art. of Limitation Law of 1855, (R. C. 1855,

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p. 1046,) but it never was the law as applicable to a possession under *color of title*.

3. The court properly refused the first and third instructions asked by the defendant, and ought to have refused those it gave at his instance. The first is fatally bad, because it leaves wholly out of view the question whether the possession of the defendant was adverse to the plaintiffs, an element which is of the very essence of the defence of the statute of limitations. A possession even for a hundred years, if not adverse, would not bar him who has the legal title.

The third instruction is objectionable, in that it presents an abstract proposition of law which could in nowise assist the jury in making a verdict.

Let the judgment of the Circuit Court be reversed, and the cause remanded for a new trial, in accordance with this opinion. The other judges concur.



STATE, Respondent, v. JOHN DANIELS, Appellant.

Indictment—Larceny.—The stealing of several articles of property at the same time and place constitutes but one offence, and should be so charged.

Indictment—Larceny.—The stealing of a horse, mare, or gelding, is made grand larceny by the statute, and it is therefore unnecessary to charge the value of the property in the indictment. (R. C. 1855, p. 575, § 25.)

Practice, Criminal.—The *minimum* penalty affixed by the statute to the larceny of a horse, mare, or gelding, is ten years' imprisonment in the penitentiary, and it was error in the Circuit Court to reduce the punishment assessed by the jury below the *minimum* thus affixed by the statute. (R. C. 1855, p. 1197, § 8.)

Appeal from Greene Circuit Court.

Aikman Welch, attorney general, for the State.

I. The court committed no error in overruling defendant's motion to quash. The indictment is not bad for duplicity, since the stealing of several articles of property at the same

time and place constitutes but one offence. (*Lorton v. The State*, 7 Mo. 55.)

II. It is not necessary, where horses are the subject of larceny, to allege any value, since to steal a horse of any value is grand larceny. (1 R. C. 1855, p. 575, § 25.) The indictment is therefore sufficient.

III. The court did not err in giving the instructions asked for on the part of the State, nor in refusing the instructions asked for by defendant. The instruction asked for by defendant did not correctly declare the law, nor was there any evidence upon which to base it.

BAY, Judge, delivered the opinion of the court.

The defendant was indicted in the Greene Circuit Court for feloniously stealing, taking and carrying away one mare and one gelding, the property of one Richard W. Bragg. A motion was made to quash the indictment, which being overruled, the defendant was tried, and the jury found him guilty and assessed his punishment at ten years in the penitentiary. The case is brought here by appeal. It is contended by the defendant that the indictment is defective in this: that it charges the defendant with having stolen a mare and gelding, and omits to state the value of the property alleged to have been taken. We see no force in either of the objections. In *Lorton v. The State*, 7 Mo. 55, this court held that the stealing of several articles of property at the same time and place constitutes but one offence. This is unquestionably the law. (See 3 Chitty's Criminal Law, 959.)

The other objection has no application to an indictment of this kind. As a general rule, an indictment for larceny should state the value of the property taken, in order that the record may show whether the charge is grand or petit larceny; but under our statute the stealing of a mare or gelding is made grand larceny without reference to value, and therefore it is not necessary to the validity of the indictment that the value should be stated.

State v. Rose.

This case will have to be remanded for error in the judgment of the court below. The penalty fixed by law for an offence of this kind is imprisonment in the penitentiary *not less than ten years*. The jury assessed the punishment at ten years, the *minimum*. The court, however, in giving judgment upon the finding of the jury, reduced the time to two years. The statute which gives power to the court, in cases of conviction, to reduce the extent or duration of the punishment assessed by a jury, if, in its opinion, the conviction is proper, but the punishment assessed is greater than under the circumstances of the case ought to be inflicted, never contemplated that the court should have power to reduce it below the *minimum*. The judgment of the court is therefore illegal and unauthorized.

Judgment reversed, and cause remanded for a new trial.



STATE OF MISSOURI, Appellant, v. REUBEN A. M. ROSE, Respondent.

Indictments.—An indictment which charges the defendant with an indecent exposure of his person on the public highway, but omits to charge that the act was open and notorious, although not good under sec. 8, art. 8, of the Act of Crimes and Punishments, (R. C. 1855, p. 624,) is yet good as an indictment for a misdemeanor at common law.

Crimes—Misdemeanors.—Whatever act openly outrages decency and is injurious to public morals, is a misdemeanor at common law, and is indictable as such.

Appeal from Greene Circuit Court.

The defendant was indicted at the January term of the Greene Circuit Court, for the year 1860, for an indecent exposure of his person on a public highway. The defendant filed his motion to quash the indictment, assigning the following reasons therefor:

1. Because there is no offence charged.
2. Because it does not use the language of the statute descriptive of any offence known to the law.

State v. Craighead.

This motion was sustained by the court, to which the State excepted and brings the case to this court by appeal.

Aikman Welch, attorney general, for the State.

I. The indictment may not use language sufficient to make it good, under art. 8, § 8, of the act in regard to Crimes and Punishments, (R. C. 1855, p. 624,) but it will be found to be a good indictment at common law. (Arch. Crim. Plead. 494; *State v. Appling*, 25 Mo. 315; 4 Black. Com. 65, *n.*; *Gresham et al. v. The State*, 2 Yerg. 589; 1 Russ. Crimes, 46.)

BAY, Judge, delivered the opinion of the court.

The indictment in this case does not allege, in the words of the statute, that the act of public indecency was open and notorious, and is therefore not good under the statute; but the offence charged is indictable at common law, for whatever outrages decency and is injurious to public morals is a misdemeanor at common law and punishable as such. (*Rex v. Cruden*, 2 Camp. 69; 1 Russ. Crimes, 46; 4 Black. Com. 41; 2 Yerg. 589; 25 Mo. 315.)

The court below, therefore, erred in sustaining the motion to quash the indictment, for which reason its judgment will be reversed and the case remanded; the other judges concurring.

STATE, Respondent, v. STEPHEN CRAIGHEAD, Appellant.

Indictment—Jeofails.—A mistake in an indictment, which stated that the defendant, with a knife, did feloniously assault and wound one Dunlop, by means of which wounding the life of the said *Craighead* was then and there endangered, &c., is cured by the 27th sec. of art. 4 of Act of Practice in Criminal Cases, R. C. 1176, the mistake being merely clerical, and in no way tending to prejudice the substantial rights of the defendant.

Appeal from Callaway Circuit Court.

Welch, attorney general, for the State.

I. The indictment was sufficient, and the court committed

no error in overruling the motion of defendant to quash. The indictment is framed under sec. 39, art. 2, Crimes and Punishments, R. C. 567, and charges the defendant with a *felonious* assault. Had death ensued from the wound inflicted by defendant, it would, under the averments of the indictment, have amounted to manslaughter in the third degree. (R. C. 1855, p. 561, § 13.) Hence, so far as the indictment shows upon its face, (and the court cannot, on a motion to quash, examine into the evidence,) the assault charged was a *felonious* assault.

II. The second reason assigned by defendant in his motion to quash, (and it is the only other ground assigned,) is, that the defendant is charged with inflicting a wound upon *Dunlop*, whereby the life of defendant *Craighead* was endangered. This is a mere clerical mistake by the circuit attorney, and did not in the least degree prejudice the case of the defendant, or operate to his injury; and was, therefore, no sufficient reason to quash the indictment. (1 R. C. 1855, p. 1176, § 27.) The words, "the said *Craighead*," in the close of the indictment, may be rejected as surplusage. (1 Chit. Plead. 230; 1 Salk. 324.)

BAY, Judge, delivered the opinion of the court.

The defendant was indicted at the October term, 1860, of the Callaway Circuit Court, for a felonious assault upon one William T. Dunlop. The indictment was framed under the 39th sec. of art. 2 of the statute relating to Crimes and Punishments, and is in the words and figures following:

"The grand jurors of the State of Missouri, empanelled, sworn and charged to inquire in and for the body of the county of Callaway, on their oaths present that heretofore, to-wit, on the first day August, 1860, at the county of Callaway, one Stephen Craighead, without a design to effect death, and in the heat of passion, with a dangerous weapon, to-wit, a certain knife which he, the said Craighead, then and there had and held in his right hand, did then and there with said knife wilfully and feloniously assault and wound one Wil-

State v. Stubblefield.

liam T. Dunlop, by means of which said wounding and assaulting of said Dunlop by the said Craighead then and there, the life of him, the said *Craighead*, was then and there endangered, against the peace and dignity of the State.”

At the April term following, a trial was had, and the defendant was convicted and fined in the sum of one hundred dollars.

No objections were made, or exceptions taken, to the instructions of the court below, and the only question raised by the record is as to the sufficiency of the indictment. After alleging the assault committed upon the person of Dunlop, it avers that the life of *Craighead* was then and there endangered. The error consists in substituting the name of Craighead for Dunlop. It is apparent enough that this was a mere clerical error, resulting from the inadvertency of the circuit attorney, and in no sense tended to the prejudice of the substantial rights of the defendant upon the merits. The defect is, therefore, cured by the last clause of the 27th sec. of art. 4 of the act regulating the proceedings in criminal cases. (2 R. C. 1855, p. 1176.)

Judgment affirmed ; the other judges concur.



STATE, Respondent, v. STUBBLEFIELD *et al.*, Appellants.

Indictment.—An indictment under the statute for disturbing religious worship, R. C. 1855, p. 630, § 30, which charges the offence in the words of the statute, is sufficient.

Appeal from Christian Circuit Court.

The defendants were indicted at the September term, 1860, of the Christian Circuit Court, under the 30th sec. of the 8th art. of the act in regard to crimes and their punishment, (1 R. C. 1855, p. 630,) for disturbing religious worship. “The grand jurors, &c., present that Young Stubblefield and Martin Edwards, both late of the county aforesaid, on the first

day of January, in the year 1860, with force and arms, in the county aforesaid, did then and there wrongfully, maliciously and contemptuously disquiet and disturb a certain congregation and assembly of people met for religious worship, by making a noise, by rude behavior, by indecent behavior, and by profane discourse, within their place of worship, and so near to the same as to disturb the order and solemnity of the meeting, and did then and there wilfully, maliciously and contentiously menace, threaten and assault divers persons then and there, being contrary," &c.

At the March term of said court, for the year 1861, the defendant filed his motion to quash the indictment, alleging as a reason that it is double, and that two distinct offences are contained in the same count. This motion was overruled by the court, whereupon a trial was had and defendants found guilty. The court gave the following instructions on the part of the State:

1. The court instructs the jury that unless they believe from the evidence that defendant Martin Edwards disturbed or disquieted a congregation or assembly of people who had met for religious worship, either by making a noise or by rude or indecent behavior, or by profane discourse, to find the defendant Edwards not guilty.

2. The court instructs the jury, that, although they may believe that defendant Edwards made use of profane discourse, or was guilty of rude or indecent behavior, yet unless they further believe that a congregation or assembly of persons who had met for religious worship either heard him or saw him, and the order or solemnity of the meeting was disturbed by such acts or words, they ought to find him not guilty.

3. The court instructs the jury, that, unless they believe from the evidence that defendant Stubblefield did disturb or disquiet an assembly of people who had met for religious worship, either by rude or indecent behavior, yet unless they believe the order or solemnity of the meeting was disturbed thereby, they ought to find him not guilty.

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The defendants filed their motion for a new trial, which, in addition to the causes usually assigned, was the following:

"3. Because the jury, without authority, took and consulted law books after they had retired to make out their verdict, and was guided by the reading of said books."

Upon this cause alleged for setting aside the verdict, evidence was introduced by the defendants conducing to show that the jury took with them into their room the first volume of the revised statutes, which was shortly returned and the second volume taken.

The court overruled defendants' motion for a new trial; whereupon defendants filed their motion in arrest of judgment, which was overruled.

Aikman Welch, attorney general, for the State.

I. The court did not err in overruling defendants' motion to quash. The indictment is not bad for duplicity, for the offences charged are not repugnant, but will admit of the same judgment. (*State v. Porter*, 26 Mo. 206.) Charging several overt acts in a single count for disturbing religious worship, will not constitute duplicity in the indictment, because the charge consists in the disturbance of religious services, and the different acts committed are only the means to that end, and evidences of it. Where the time and place of the commission of various acts of disturbance are the same, the indictment charging such acts will not be held bad for duplicity, although all included in one count, for but one offence has been committed and but one charged; and it is questionable whether the defendants could be indicted for each act of disturbance, since the several acts are charged to have been committed at the same time and place.

The defendants might have been charged with but one act of disturbance, and convicted; but they could not also be indicted in a separate indictment for any other act committed at the same time and place. (1 Arch. Crim. Plead. 95 & 96, and *n.*; *R. v. Fuller*, 1 B. & P. 181; *R. v. Jenner*, 7 Mod. 400; 2 Burr, 983; *State v. Porter*, 26 Mo. 206.)

State v. Cox.

II. The instructions given by the court below, at the instance of the State, were too favorable for the defendants, and furnish no ground for the reversal of the judgment.

BATES, Judge, delivered the opinion of the court.

The indictment is sufficient. It follows the language of the statute, and the different acts charged to have been committed by the defendants constitute but the one offence of disturbing religious worship.

The record shows that it was testified to the court that the jury had with them in their retirement a copy of the revised statutes, but the record does not show whether the court believed the testimony so given, or what was the truth as to the matter. The instructions were very favorable to the defendants.

Judgment affirmed. Judges Bay and Dryden concur.



STATE, Respondent, v. R. F. Cox, Appellant.

Indictment.—When a statute contains provisos and exceptions in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the provisos of the act.

Indictment—Merchant without License.—An indictment which charged that the defendant did “sell at a certain store, stand, and place, &c., various articles of goods, wares and merchandise, and drugs and medicines, &c., without having a license or legal authority to sell the same,” charges the defendant as dealing as a merchant without a license, and its defects are cured by the provisions of the statute. (R. C. 1176, § 27.)

Appeal from Christian Circuit Court.

The defendant was indicted at the September term, 1860, of the Christian Circuit Court, before P. H. Edwards, judge, for dealing as a merchant, under an act to license and tax merchants, (Acts 1858-9, p. 54, § 2,) without taking out license.

At the March term of the court for the year 1861, the defendant filed his motion to quash, which was sustained by the court, and the State appealed.

Welch, attorney general, for the State.

I. Where an offence is created by statute, and exceptions are contained in the statute, but not in the section creating the offence, it is not necessary to negative such exceptions in the indictment; but the defendant must, by proper proof, bring himself within the exceptions. (*State v. Shiflett*, 20 Mo. 415; *State v. Buford*, 10 Mo. 703; *State v. Edwards*, 19 Mo. 674; 1 Chit. Crim. Law, 283.)

II. Although the indictment in this case may be informal or technically insufficient under the decisions of this court in the cases of *State v. Hunter*, 5 Mo. 360, and *State v. Martin*, 5 Mo. 361, by reason of alleged informalities, yet the Legislature, in 1855, (R. C. 1855, p. 1176-7,) for the purpose of arresting the practice of quashing indictments for informalities and deficiencies which did not affect the substantial merits of the cause, or prejudice the substantial rights of a defendant indicted, enacted that no indictment should be deemed invalid, or the judgment arrested, for any defect or imperfection which did not tend to the prejudice of the *substantial rights* of the defendant *upon the merits*. The statute of 1835, which was the statute under which the foregoing decisions were rendered, was materially different from the act of 1855; and although those decisions might be held correct under the law in force when they were rendered, yet that very practice of quashing indictments for unsubstantial objections, and thus involving the State in immense bills of costs, became an evil of such vast magnitude that the Legislature felt it to be their duty to declare a different rule for the government of our courts in future. It is submitted that under the act of 1855 the indictment in the present case should be held sufficient.

BATES, Judge, delivered the opinion of the court.

The indictment charges that the defendant did "unlawfully sell at a certain store, stand and place, occupied by him for that purpose, various articles of goods, wares and mer-

chandise, and drugs and medicines, the names of which are unknown to said grand jurors, without having any license or legal authority whatever to sell the same, contrary to the statute," &c.

On motion of defendant, the court quashed the indictment.

The statute (Acts 1858-9, p. 53) provides that "every person or copartnership of persons who shall deal in the selling of goods, wares and merchandise, at any store, stand or place occupied for that purpose, is declared to be a merchant;" and that "no person or copartnership of persons shall deal as a merchant without a license first obtained according to law."

The essence of the offence is the dealing as a merchant without a license. The single act of selling one or more articles would not constitute the offence; and if the sale of a specific article were charged, it would be necessary also to charge that the defendant did deal as a merchant. (State v. Hunter, 5 Mo. 360; State v. Martin, 5 Mo. 361.) This indictment, however, charges that the defendant did sell at a store, stand and place occupied for that purpose, various articles of goods, wares and merchandise, thus defining the defendant as a merchant dealing without license.

It was not necessary to aver that the goods were not of the manufacture or production of this State. "It is a well settled rule, that when a statute contains provisos and exceptions in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the provisos it contains." (State v. Shiflett, 20 Mo. 417.)

Whilst the indictment is inartificially drawn, and is not recommended as a precedent, it cannot be said that it contains any defect or imperfection which tends to the prejudice of the substantial rights of the defendant upon the merits. (R. C. 1855, p. 1176-7.)

Judgment reversed, and cause remanded for further proceedings. Judges Bay and Dryden concur.

MARY A. HANENKAMP'S ADMINISTRATOR, Defendant in Error,
v. FRANCIS BORGMIER, Plaintiff in Error.

Administrator.—The administrator or executor is entitled to the possession of the personal property and choses in action of the deceased in preference to the next of kin. Where the administrator of an estate, upon final settlement, was ordered to pay to the parties entitled by law, and the intestate left two children, one of whom died pending the administration, upon whose estate letters were granted; *held*, that the personal representative of the deceased child was entitled to demand the portion of the estate in the hands of the first administrator, and that a payment of the whole balance to the surviving next of kin was no defence to a suit for the half of such balance.

Error to Cole Circuit Court.

J. L. Smith, for plaintiff in error.

The plaintiff had no right to recover on the evidence offered and given in the cause. There was no evidence tending to show that Borgmier, administrator of John Hanenkamp, had notice of the fact that Ewing had administered on the estate of the minor child of his intestate in Cole county, or that there was any demands against her unpaid. Now, Mary Adelaide Hanenkamp and Mary Ann Hanenkamp, on the death of their father, John Hanenkamp, became joint tenants in their father's estate; and after the payment of all debts they would take the money in the hands of the administrator in equal parts; but in the event, as was the case, one died before the estate was finally settled or placed in their possession, then the survivor would take the whole estate, of course subject to the debts of the ancestor. (Black. Com. 149.) The said Mary Ann Hanenkamp being a minor and not having come actually into the possession of her interest in her father's estate, the same, unless there had been distribution before her death, could not pass into the hands of an administrator. Now, if there had been a final settlement of her father's estate, and an order of distribution made before her decease, money in the hands of the administrator would clearly have been payable to an administrator of her own estate. But in this case the said Mary Ann Hanenkamp

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was a mere girl, fifteen years old, entitled to a joint interest with a sister in her father, John Hanenkamp's, estate, and who died unmarried without issue. Now then, with this knowledge, the administrator gives notice of final settlement and makes it. Order of distribution is made to pay over the money in his hands to those entitled under the law to the same. Who now, after the death of Mary Ann Hanenkamp, would be entitled to said money but the sister of the deceased? It might be said that if the administrator had knowledge of the fact of there being an administrator of the estate of the said Mary Ann Hanenkamp, and of these allowances, that then the administrator could not pay the money to the survivor; but in this case there was no notice of administration or indebtedness of the estate of the said Mary Ann Hanenkamp.

White, for defendant in error.

I. The first instruction asked by the defendant in error and given by the court, if sustained by the evidence, is certainly correct.

II. If the first instruction is in accordance with the law and the evidence, the second must be; otherwise an administrator might do such a thing as to pay the whole of an estate to one heir, whose brother might have married the heir to whom the money is paid. Martin Borgmier, the husband of Mary Adelaide Hanenkamp, is the brother of Francis Borgmier, the defendant in this case. If the law was as is contended great injustice might be done.

The defendant states in his answer that at the time of his final settlement as administrator of John Hanenkamp, there was no administration lawfully granted on the estate of the said Mary Ann. He made his final settlement in August, 1859, and in May, 1857, administration was granted upon the estate of Mary Ann.

BATES, Judge, delivered the opinion of the court.

This suit is brought from the Cole Circuit Court by writ

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of error. John Hanenkamp died in 1855, and defendant administered his estate. Hanenkamp left two children, his heirs, Mary Adelaide and Mary Ann. Mary Adelaide married and survives. Mary Ann died in 1856, and in 1857, by order of the County Court, the public administrator, the plaintiff, took charge of her estate, and debts were allowed against it. In 1858, defendant made final settlement of the estate of John Hanenkamp, and was ordered to pay over the balance in his hands to those entitled thereto under the law. He paid the whole to Mary Adelaide and her husband.

The plaintiff brought this suit for half of the balance in defendant's hands when he made final settlement of John Hanenkamp's estate, and recovered it, and defendant brings up this case.

The instructions given in the court below are to the effect that the plaintiff, as administrator of Mary Ann Hanenkamp, was entitled to be paid one half of the estate of John Hanenkamp. Although it may well be that the surviving daughter of John Hanenkamp is the heir of her deceased sister, yet the administrator, as the personal representative, is entitled to receive and administer her property for the benefit of all interested in it, including creditors as well as distributees.

The judgment of the court below is affirmed. Judges Bay and Dryden concur.

STATE OF MISSOURI, Defendant in Error, v. SAMUEL DEWITT,
Plaintiff in Error.

Crimes—Larceny.—The defendant was indicted for feloniously stealing cattle which had been levied upon by the sheriff by virtue of an execution against the defendant and committed to the custody of a third party for safe keeping. *Held*, that the State was bound to show affirmatively that the defendant knew of the execution and seizure of the cattle by the sheriff, so as to show a felonious intent in the taking.

Error to Linn Circuit Court.

G. T. White, for plaintiff in error.

I. The defendant was not present when the verdict was returned. The record should affirmatively show that he was present. No person indicted for a felony can be tried unless he be personally present during the trial. (R. C. 1855, p. 1191; Pr. Cr. Cases, art. 6, § 16.) So it is at common law; the verdict in all cases of felony and treason must be delivered in open court, in the presence of the defendant. (1 Arch. C. P. 173, *n.* 2; 1 Chit. C. L. 636; State v. Matthews, 20 Mo. 56; State v. Buckner, 25 Mo. 172, and cases there cited; State v. Cross, 27 Mo. 332.)

II. In this case the defendant was the owner of the property alleged to have been stolen; and if there was a valid execution and levy, the sheriff acquired thereby, at most, but a special property in the cattle. The proof, therefore, of the issuing and delivery to the officers of such a writ upon a judgment against the defendant, and of the levy and removal of the property from defendant's possession in virtue thereof, were indispensable in order to give even the color of criminality to any participation of the accused in taking the property. The case is one, then, that calls strongly for the application of the rule respecting the distinction between primary and secondary evidence, and as it is applied in the authorities before referred to.

For these reasons, all the instructions given for the State on the hypothesis of a judgment and execution against the defendant, and the levy upon his property, were manifestly wrong, and the counter-instructions asked by the defendant should have been given.

III. One of the counts in the indictment alleges the cattle to be the *property* of Quick. If they were taken at all, they were taken while in his possession. But it is submitted that, as according to the testimony they were merely placed in his possession by the officers for safe keeping, he had no such special property in them as to support an indictment, and that larceny cannot be laid of the goods as his property. (Corn v. Morse, 14 Mass. 217; Whart. Cr. Law, 2d ed., 569; Norton v. The People, 8 Cowen, 137.)

The third instruction was, therefore, wrong. There is no pretence whatever that the property belonged, in the language of the instructions, to Quick. Sustaining such a relation to the sheriff in the matter, and his (Quick's) possession being the possession of the officer, it is further submitted that the accused could not be convicted of larceny in resuming, if he did so, the possession of his own property before the sale under the execution. It may be admitted that where goods are taken by a sheriff under a *feri facias*, he acquires such a special property as would support an indictment for the larceny against any other than the *owner* (the execution debtor), but not against the original owner himself. For, though the goods are in *custodia legis*, the original owner continues to have a property in them until they are sold. The court will observe that the cattle were taken, if at all, by defendant before sale. And if he pays the debt, he is entitled to have them returned, and his debt to the plaintiff in the suit continues until the goods seized are applied to its liquidation, and the sheriff is accountable to the original owner for the goods so seized. (2 Russ. Cr. 91.)

IV. It appearing that defendant was not a principal in the alleged taking, the indictment and all the proceedings thereon are wrong, and the defendant should now be discharged; for if a new trial were ordered, he could not be convicted on this indictment, the evidence having disclosed the fact that he did not commit the larceny (if a larceny was committed), but he was, at most, an accessory before and after the fact. (1 Chit. 256; Barb. Cr. Law, 170-187; 3 Greenl. Ev. § 155; Rose. on Ev. 506; 10 Wend. 165; 8 Cowen, 151; 14 Mass. 216; Yelv. Rep. 344-5.)

Welch, attorney general, for the State.

I. The court did not err in overruling the motion for a new trial. The instructions given by the court, though unnecessarily voluminous, present the case fairly to the jury, and this court will not reverse unless manifest injustice has been done defendant, or the jury misled.

The property was correctly laid in T. M. Rooker, the sheriff, and the act of defendant in taking his own property after it had been levied upon and taken into possession by the sheriff, was larceny. The sheriff has such a title to the property that it will be larceny in the execution defendant to take such property from the possession of the sheriff with intent to charge another with the value of it. (Palmer v. People, 10 Wend. 165.)

This is not one of those cases in which the defendant can set up a claim of property to reduce the offence from a felony to a trespass, since the levy of the execution and the taking the property into possession carried enough of title with it to make the retaking of it by defendant a larceny.

II. It was not necessary for the State to prove by record evidence the regular appointment of Rooker as sheriff. Proof of having acted in that capacity is sufficient. (1 Greenl. Ev. 98 & 108; Rose. Cr. Ev. 16 & 7; Rex v. Verelet, 3 Camp. 432; Fowler v. Bebee, 9 Mass. 231.)

Nor was the State bound to show that the execution was valid; it having emanated from the proper office, was *prima facie* evidence, at least, of its validity, and sufficient to authorize the sheriff to execute it. Its validity could not be passed upon in this collateral proceeding. The evidence shows the execution to have issued from the clerk's office in the case of Harris v. Dewitt. This *prima facie* evidence, which raised the legal presumption of validity, might have been rebutted by the defendant, but he did not attempt it. Nor was it necessary to show that the property levied upon was subject to execution. The statute prescribes the remedy where property exempt from execution is levied upon by an officer, but the defendant did not set up such claim in the manner pointed out by law; nor did the defendant, on the trial of this cause, introduce any evidence of any kind to show that the property levied on by Rooker was exempt from execution. The proof of this fact must come from the defendant.

III. Nor was the sheriff bound to notify the defendant of

the levy at the time he made it. The law does not require the sheriff to give any notice of levy, and none being required, none can be demanded, and no advantage can be taken of a want of such notice. Had the sheriff given notice, it would not have been of any virtue, since it would have been doing what the law did not authorize or require. It would not have been an official act.

BAY, Judge, delivered the opinion of the court.

Defendant was indicted in the Linn Circuit Court for feloniously stealing, taking and carrying away two steers, alleged in one count to be the property of one T. W. Rooker; in another count, the property of P. W. Banning; and in a third count, the property of one J. E. Quick.

To this indictment the defendant filed a plea of not guilty, and at the May term, 1862, was tried and convicted, and his punishment assessed at two years' imprisonment in the penitentiary.

It appears from the evidence, as preserved in the bill of exceptions, that one Harris had obtained in said court a judgment for about one hundred and ninety dollars against said Dewitt, upon which an execution was issued directed to the sheriff of said county. This execution was placed into the hands of Banning, a deputy sheriff, about the 16th of August, 1860, and he levied it upon the cattle, the subject of the larceny, on the 6th or 7th of September following, as the property of said Dewitt, and placed said cattle in the custody of said Quick for safe keeping. Quick placed them in his pasture, where they remained about two weeks. They were taken from this pasture in the night-time, and there was proof tending to show that Dewitt was implicated in the taking.

Twenty-six instructions were asked and eighteen given—enough to have utterly confounded any jury of ordinary intelligence. This practice of giving a multiplicity of instructions in cases involving but one or two simple propositions of law, cannot be too strongly condemned. Instead of aiding

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the jury in their investigation, its only tendency is to confuse and embarrass them.

In the view taken of this case, it is unnecessary to pass upon those instructions, for upon a careful examination of the evidence we are of the opinion that it does not support the finding of the jury. At the time of the levy of the execution, the cattle belonged to the defendant, who afterwards found them in the pasture of Quick, and no evidence was given to show that defendant had any knowledge whatever as to the character of Quick's possession. It was not shown upon the trial that defendant was present when the levy was made, or knew that the cattle had been seized by the sheriff by authority of an execution issued against him. No knowledge of the existence of any execution against him was shown. The State should have shown such knowledge affirmatively, for without it it is impossible to fix upon the defendant a criminal or felonious intent.

Judgment reversed and case remanded for new trial ; the other judges concurring.

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BLANCJOUR, Respondent, v. TUTT *et al.*, Appellants.

Evidence.—Declarations made by the endorser of a bill of exchange, or note, affecting the validity of the bill, and not known to the endorsee, are not evidence against the endorsee.

Appeal from Weston Court of Common Pleas.

Merryman, for appellant.

Were the declarations of Young competent testimony for Tutt if they were made while he was the owner of the bill ? We think they were competent testimony. Suppose Young had never negotiated the bill, and had sued Tutt in his own name. We think, in that case, his confessions would be competent. Then the transfer of it did not change the law, so far as Tutt was concerned, nor his defence, nor the rule of evidence.

The fact that Young being made a party to the suit does not affect Tutt's defence, nor the rule of testimony, Young being only an endorser of the bill. And the law-makers did not intend, by giving the endorsee a remedy against all the parties in one suit, to change the rule of evidence. (1 Greenl., § 191.)

Burns, Wolf & Burns, for respondent.

I. The declarations of Young, to be material under any circumstances, must be shown to have been made while he was the owner and in the possession of the draft. This is not shown by the record.

II. The appellants do not pretend that the appellee was any other than an innocent endorsee for value without notice, and in such case it cannot be sustained that the declarations of the assignor are admissible, especially where the note was negotiated before it was dishonored. (1 Greenl. Ev., p. 231, § 190.)

III. Our statute will not be construed so as to defeat the rights of an innocent purchaser without notice. It gives to the maker of notes, &c., executed for gaming considerations the right to sue within three months, to vacate, annul, or set aside notes and judgments founded upon such considerations, but it was not intended that any maker of such a note should suffer it to remain in circulation for a whole year and then avoid it, even if in the hands of an innocent purchaser for value, without notice, endorsed before maturity.

IV. In the hands of an innocent endorsee for value, without notice, and before maturity, this bill is neither void, nor are the declarations of the endorser material.

V. The declarations of Young are immaterial on another ground. He was a party defendant to the record, and as such his admissions were inadmissible for himself or his co-defendant.

BATES, Judge, delivered the opinion of the court.

The plaintiff sued Tutt as drawer and Young as endorser of a bill of exchange, which was endorsed by Young to the

plaintiff. Young failed to answer. Tutt answered that the bill was given without consideration, it being for a sum won by Young from him in gaming with cards. Verdict and judgment were given for the plaintiff.

The court instructed the jury that the plaintiff was entitled to recover, unless the bill of exchange was executed for money won at cards by Young from Tutt. As no other defence was made, this instruction properly declared the law.

At the trial, the defendant Tutt offered to prove declarations made by the other defendant Young, but without showing the time when they were made with reference to the time of the transfer of the bill to the plaintiff, and without showing any knowledge of them by the plaintiff. The declarations of Young were objected to as evidence, and rejected by the court. The court also instructed the jury that "the declarations of Young are excluded from the jury, so far as they occurred anterior to the assignment." There was no error in rejecting this testimony. Declarations made by the endorser of a bill of exchange affecting the validity of the bill, and not known to the endorsee, are not evidence against the endorsee.

Judgment affirmed. Judges Bay and Dryden concur.



PACIFIC RAILROAD COMPANY, Respondent, v. FREDERICK BURGER, Appellant.

Practice—Final Judgment.—The judgment dissolving an injunction and dismissing the bill of the plaintiff, is not a final judgment from which an appeal lies.

Appeal from Newton Circuit Court.

Welch, attorney general, for respondent.

DRYDEN, Judge, delivered the opinion of the court.

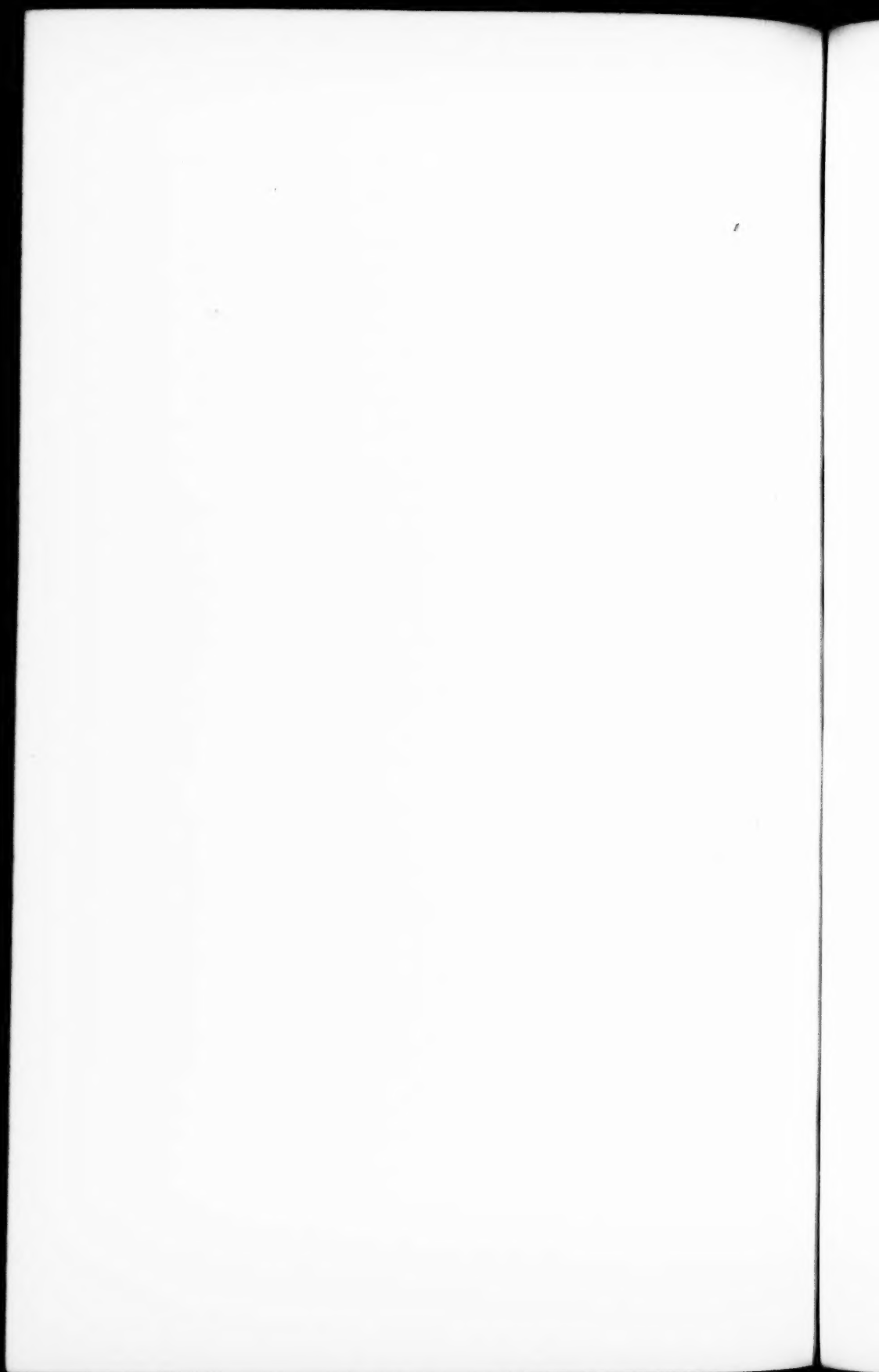
There does not appear in the record any final judgment, and, therefore, no appeal lies in the case. The suit was a

proceeding for injunction brought by respondent against the appellant. After the coming in of the answer, the plaintiff's bill was dismissed and the injunction dissolved; and thereupon the appellant filed his motion for an assessment of the damages occasioned by the injunction. A jury was called who assessed the damages at five thousand dollars, and judgment was rendered by the court on the verdict against the respondent and Peter E. Blow, who was security in the injunction bond. At the same term, the respondent filed a motion to set aside the verdict and judgment, and the court accordingly set the same aside; and the appellant excepted and appealed to this court.

The order setting aside the verdict and judgment left the case standing on Burger's motion for the assessment of damages; and for anything appearing in the record, that motion still remains undisposed of. Until a final disposition is made of it, no appeal lies.

The other judges concurring, the appeal is dismissed.

END OF JULY TERM.



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A

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ADMINISTRATION.

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2. *Appeal—Proceedings*.—The proceedings in an appeal from the judgment of the County Court in 1857, approving an administrator's sale of real estate made under the R. C. of 1835, must be conducted in accordance with the statutes in force at the time the appeal is taken. (R. C. 1855, p. 1025, § 16.)—*Id.*
3. *Appeal—Final Judgment*.—A judgment of the Circuit Court upon an appeal from the County or Probate Court, refusing to approve the report of sale of the real estate made by the administrator, is not a final judgment from which an appeal lies to the Supreme Court. (R. C. 1835, p. 53, § 20.)—*Id.*
4. *Administrator—Title*.—Although the administrator or executor is entitled to the personal effects and choses in action of the decedent, he holds them only as trustee for the creditors and next of kin, and not for his own benefit; therefore the effects of the decedent cannot be seized by a judgment creditor of the administrator in payment of the debt of such administrator. Nor are the payees of a note given to the administrator for goods of the

ADMINISTRATION—Continued.

decendent sold by him, liable as garnishees to a judgment creditor as being debtors of such administrator. (The cases of *Lecompte v. Sergeant*, 7 Mo. 351, and *Thomas v. Relfe*, 9 Mo. 377, overruled.)—*Lessing et al. v. Ver-trees, et al.*, 431.

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6. *Administrator—Title*.—The administrator or executor is entitled to the possession of the personal property and choses in action of the deceased in preference to the next of kin. Where the administrator of an estate, upon final settlement, was ordered to pay to the parties entitled by law, and the intestate left two children, one of whom died pending the administration, upon whose estate letters were granted; *held*, that the personal representative of the deceased child was entitled to demand the portion of the estate in the hands of the first administrator, and that a payment of the whole balance to the surviving next of kin was no defence to a suit for the half of such balance.—*Hanenkamp's Adm'r v. Borgmier*, 569.

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2. *Note*.—When a holder of a note secured by mortgage had prior to his bankruptcy endorsed the note to third parties as collateral security for the performance of conditions, and the endorsees subsequent to the bankruptcy transferred the notes without endorsement to the plaintiff's intestate; *held*, that the plaintiff, having the legal title, had the right to enforce collection of the note and the foreclosure of the mortgage, and that the liability of the plaintiff to account to the assignee in bankruptcy did not affect the right of the plaintiff.—*Overall, Adm'r, v. Ellis*, 322.
3. *Conflict of Laws—Sale—Insolvent*.—The bankrupt and insolvent laws of each State or nation bind and affect their own citizens, and as against them will be enforced by the courts of other States when questions arise as to the title conveyed under such laws. Therefore, where plaintiffs and defendants were citizens of Louisiana, and the defendants had made an assignment of their property in accordance with the laws of that State for the benefit of their creditors, and a syndic or assignee had been appointed to collect and distribute the assets of the insolvents, one of the creditors, a citizen of, and residing in that State, cannot secure a preference over the remaining creditors in his own State by process of attachment against the property and assets of the insolvents in this State. As against such attachment, the title of the assignee of the insolvents will prevail.—*Einer v. Beste & Deynood*, 240.

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3. *Levy—Execution Sale*.—When a tract of land has been laid out into blocks and lots, with streets and alleys dedicated to the public use, and some of the lots have been sold to third parties, an attachment subsequently levied upon the tract, by its description before subdivision, will be a nullity; and an execution sale, under the judgment in the attachment suit, will not convey the title.—*Henry v. Mitchell*, 512.
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6. *Administrator—Debtor*.—Although the administrator or executor is entitled to the personal effects and choses in action of the decedent, he holds them only as trustee for the creditors and next of kin, and not for his own benefit; therefore, the effects of the decedent cannot be seized by a judgment creditor of the administrator in payment of the debt of such administrator. Nor are the payees of a note given to the administrator for goods of the decedent sold by him, liable as garnishees to a judgment creditor as being debtors of such administrator. (The cases of *Lecompte v. Sergeant*, 7 Mo. 351, and *Thomas v. Relfe*, 9 Mo. 377, overruled.)—*Lessing et al. v. Ver-trees et al.*, 431.
7. *Practice*.—The defence by a garnishee that the assets of a judgment debtor have been transferred by his conviction for crime, and being sentenced to the penitentiary, if a defence at all, cannot be brought forward by a motion to dismiss; it should be presented by plea.—*Wise v. Wolff*, 209.

B

BAILMENT.

1. *Carriers*.—The undertaking of a common carrier to transport goods to a particular destination necessarily includes the duty to deliver them in safety. The delivery must be made or tendered in proper time and manner and at a proper place, and *prima facie* to the consignee personally.—*Bartlett v. Steamboat Philadelphia*, 256.
2. *Negligence*.—In an action to recover for the pasturing of cattle, some of which were not returned by the bailee, it is incumbent upon the plaintiff to prove that he used the degree of diligence required of him by his contract. The degree of diligence required depends upon the terms of the contract.—*Goodfellow's Exec'r v. Meegan*, 280.

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3. *Forwarder*.—It is the duty of a forwarding merchant to advise his consignee of the shipment made to his address, and the failure of the carrier to deliver the goods shipped in accordance with the bill of lading will not discharge him of liability.—*Railey v. Porter*, 471.
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BANKS.

1. *Account Current—Balance*.—A banker is not required by law to apply a balance due by him on account current to his depositor to the payment of a liability from his customer to himself upon a bill or note. In a suit by the banker against the acceptor of a bill, the fact that the drawer had an account with the banker, and that after protest of the bill there were balances in favor of the drawer, would not be evidence in favor of the acceptor to show a payment or satisfaction by the drawer.—*Citizens' Bank, &c., v. Carson*, 191.

BILLS OF EXCHANGE AND NOTES, NEGOTIABLE.

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2. *Note*.—When a holder of a note secured by mortgage had prior to his bankruptcy endorsed the note to third parties as collateral security for the performance of conditions, and the endorsees subsequent to the bankruptcy transferred the notes without endorsement to the plaintiff's intestate; *held*, that the plaintiff, having the legal title, had the right to enforce collection of the note and the foreclosure of the mortgage, and that the liability of the plaintiff to account to the assignee in bankruptcy did not affect the right of the plaintiff.—*Overall, Adm'r, v. Ellis*, 322.
3. *Consideration—Note*.—A note given by an heir as a memorandum or evidence of an amount advanced to him by the payee, is without valuable consideration, and as an evidence of debt is void.—*Hardin, Adm'r, v. Wright*, 452.
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5. *Note—Equity*.—An answer setting forth that the note sued upon was endorsed to the holder after maturity as a collateral security, and with notice of an agreement between the maker and payee that the note was to be delivered to trustees to pay off encumbrances upon the lands in consideration of the purchase of which the note was given, presents a defence in equity which it was error to strike out and give judgment for the plaintiff.—*Id.*
6. *Maturity of*.—Where the defendant had become security upon notes given in consideration of lands sold to the principal, and the principal subsequently executed a deed of trust to secure payment of the same notes, which deed

BILLS OF EXCHANGE AND NOTES, NEGOTIABLE—*Continued.*

contained a proviso that in case of default for thirty days in the payment of any one of the notes, all the notes should become due and payable, and that the trustees might proceed to sell the lands and pay all of said notes, whether due on their face or not; *held*, 1. That by the terms of the deed the notes became due only so far as to authorize a payment from the proceeds of sale, and that no suit could be prosecuted upon them until they matured.—*Morgan v. Martien*, 438.

BOATS AND VESSELS.

1. *Power of Master*.—The master of a boat in the home port has no authority as master to give bond and procure security for the discharge of the boat under the 14th section of the act relating to boats and vessels, (R. C. 1855, p. 307,) so as to bind the owners to reimburse the security for such sums as he may be compelled to pay. He is not the agent of the owners for such a purpose, and they will not be liable unless they recognize or ratify his acts in some manner.—*Carr v. Burke*, 233.
2. *Power of Master*.—The master of a steamboat may, in the home port, in his capacity of agent, employ persons to serve on the boat, and contract for the necessary stores and supplies.—*Id.*
3. *Contract—Privity*.—Where a steamboat was attached, in her home port, under the statute for a breach of a contract of affreightment, and the master procured a security to unite with him in giving bond to procure the discharge of the boat, and judgment was rendered against the master and security, the security was compelled to pay the judgment; *held*, that the security could not recover as for money paid and expended against the enrolled owners, without showing that he became security at their request, or that they ratified the acts of the master, or that there was some privity of contract either in fact or in law. *Bates*, Judge, dissenting.—*Id.*
4. *Forwarder*.—It is the duty of a forwarding merchant to advise his consignee of the shipment made to his address, and the failure of the carrier to deliver the goods shipped in accordance with the bill of lading will not discharge him of liability.—*Railey v. Porter*, 471.

BONDS, NOTES, AND CHOSES IN ACTION.

See **BILLS OF EXCHANGE**.

1. *Assignment of right of action*.—To give the grantee in the assignment of a lease a right of action upon the broken covenants of a prior assignee, the right of action upon the breaches of the covenant must be assigned. The verbal promises of the prior assignee to the subsequent assignee to pay the sum due for the breaches of the covenant would be void for want of consideration between the parties.—*Woodburn v. Renshaw*, 197.

C

CONFLICT OF LAWS.

1. *Sale—Assignment—Insolvent*.—The bankrupt and insolvent laws of each State or nation bind and affect their own citizens, and as against them will be enforced by the courts of other States when questions arise as to the title conveyed under such laws. Therefore, where plaintiffs and defendants were citizens of Louisiana, and the defendants had made an assignment of

CONFLICT OF LAWS—*Continued.*

their property in accordance with the laws of that State for the benefit of their creditors, and a syndic or assignee had been appointed to collect and distribute the assets of the insolvents, one of the creditors, a citizen of, and residing in that State, cannot secure a preference over the remaining creditors in his own State by process of attachment against the property and assets of the insolvents in this State. As against such attachment, the title of the assignee of the insolvents will prevail.—*Einer v. Beste & Deynood*, 240.

CONTRACTS.

1. *Privity*.—Where a steamboat was attached, in her home port, under the statute for a breach of a contract of affreightment, and the master procured a security to unite with him in giving bond to procure the discharge of the boat, and judgment was rendered against the master and security, the security was compelled to pay the judgment; *held*, that the security could not recover as for money paid and expended against the enrolled owners, without showing that he became security at their request, or that they ratified the acts of the master, or that there was some privity of contract either in fact or in law. *Bates*, Judge, dissenting.—*Carr v. Burke*, 233.
2. *Jurisdiction—Patent*.—The courts of the State have jurisdiction in cases of contracts in which patents are brought in collaterally. When the defendants, who had been sued for a breach of the plaintiff's patent for putting up cemented hams, agreed with the plaintiff that if he would dismiss the suit against them, and allow them the partial use of the patent for the year, they would not manufacture or put up cemented hams of any kind during the existence of the patent; *held*, that the suit upon such contract was properly brought in the State courts.—*Billings v. Ames*, 265.
3. *Restraint of Trade*.—*Held*, also, that such contract was not void, as being in restraint of trade. (*Presbury v. Fisher & Bennett*, 18 Mo. 50, cited.)—*Id.*
4. *Construction*.—*Held*, also, that such contract not only prohibited the defendants from putting up the article covered by the patent, but from putting up articles resembling those described in the patent and liable to compete therewith in market.—*Id.*
5. *Damages*.—In an action upon such contract, the measure of damages was properly declared to be the amount the plaintiff's hams had depreciated in price by the cemented hams put up and sold for defendants, after the expiration of the year mentioned in the contract, and before the commencement of this suit.—*Id.*
6. *Consideration*.—Plaintiffs having an unconfirmed claim to lands, released the same to the defendant, he undertaking to prosecute the claim at his own expense, and for which he was to pay, if successful, a sum stipulated. The deed *inter partes*, also stipulated that after confirmation the land was to be considered as mortgaged for the consideration money. The defendant prosecuted the claim which was confirmed by Congress. *Held*, that when the claim was confirmed, the consideration became due.—*Clamorgan v. Greene*, 285.
7. *Sunday*.—No damages can be recovered for a breach of contract for unnecessary labor to be done on Sunday, such as playing music at a beer-garden. (R. C. 630, § 33.)—*Bernard v. Lipping*, 341.

CONTRACTS—*Continued.*

8. *Special*.—Where the plaintiff specially contracted with the defendant to serve the defendant for a definite service, at a fixed price, and before the completion of his contract voluntarily and without cause left the employment of the defendant, he can recover nothing for his services. (*Posey v. Garth*, 7 Mo. 96; *Dickson v. Caldwell*, 17 Mo. 575; and *Schnerr v. Lemp*, 19 Mo. 40. Approved.)—*Henson v. Hampton*, 408.
9. *Consideration*.—*Note*.—A note given by an heir as a memorandum or evidence of an amount advanced to him by the payee, is without valuable consideration, and as an evidence of debt is void.—*Hardin, Adm'r, v. Wright*, 452.
10. *Sale*.—*Fraud*.—When a vendor sells property having a latent defect of which he is aware, but which he fails to disclose to the vendee, knowing that the latter is acting upon the supposition no such defect exists, he is guilty of a fraud, and the fraud may be pleaded as a defence to an action for the price of the property.—*Cecil, Adm'r, v. Spurger*, 462.
11. *To marry*.—In a suit for breach of promise of marriage, it is necessary to prove the mutual promises of both plaintiff and defendant.—*Standiford v. Gentry*, 477.
12. *Repairs*.—Where the defendant contracted with the plaintiff to build a bridge in accordance with certain plans and specifications, and bound himself to keep such bridge in repair for the term of three years, he is not liable to rebuild if the bridge be destroyed by fire.—*Livingston County v. Graves*, 479.

CORPORATIONS, MUNICIPAL.

1. *Independence*.—The City of Independence has, by virtue of its charter, authority to provide by ordinance for the punishment of offences against the peace of the city, and for the offence of attempting to rescue a prisoner from the custody of its officers. (*Acts, 1853, p. 64.*)—*City of Independence v. Moore*, 392.

CORPORATIONS.

1. *Evidence*.—*Name*.—The plaintiff claiming to be a corporation by the laws of New York, sued by the name of "The Bank of Commerce." The articles of association produced to prove the plaintiff's right to sue as a corporation declared that the name to be used should be "Bank of Commerce, in New York." *Held*, that the articles offered were not competent evidence to prove the existence of a corporation bearing the name of the plaintiff.—*Bank of Commerce v. Mudd*, 218.
2. *Powers*.—Every corporation in this State has power to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in the charter. Therefore, a corporation created for the purpose of mining and transportation of coal, etc., had the power to purchase and use a steamboat for the purposes of its business in transporting and delivering coal, etc.—*Callaway Min'g & Man'g Co. v. Clark*, 305.
3. *Entries*.—*Evidence*.—Where the defendant, sued as a corporation, pleaded that it had not organized under the acts of incorporation, the book of entries containing the articles of the association signed by the associates, and the

CORPORATIONS—*Continued.*

record of the proceedings, was properly admitted in evidence to prove the actual organization of the corporation.—*Foster v. White Cloud City Co.*, 505.

CONSTABLES.

See OFFICER, 1, 3.

CONVEYANCES.

1. *Description—Uncertainty.*—A deed dated March 6, 1775, from G. to O., described "a lot of one arpent in front by forty arpens in depth, situated in the Grand Prairie; bounded on one side by Mr. Laclede, and on the other side by the said vendor, such as it now exists, which the said O. has seen and is satisfied therewith." At the date of the deed G. owned a lot of three by forty arpens, which was bounded on both sides by Mr. Laclede. *Held*, that the deed was void for uncertainty of description.—*Bell v. Dawson*, 79.
2. *Powers—Marriage Settlement.*—In view of marriage, property was conveyed by settlement and contract by the intended wife, to trustees, to hold until marriage to the use of the grantor and her heirs, and from the marriage to the sole and separate use, benefit and disposal of the wife for and during her natural life, free of her husband's control, &c., and to such uses as the said wife might by writing, &c., direct and appoint; and on her death to such uses as she by will might appoint and direct; and if she died intestate, to the use of the issue of the marriage then living; and in default of such issue, to the use of the heirs of said wife. The deed further provided that all the property might from time to time be successively charged, invested and reinvested indefinitely by the trustees on the request in writing, &c., of the wife. *Held*, that the wife, with the trustees, could, by proper conveyances, pass the fee of the lands settled by the deed, and that she was not confined to the disposal of a life estate only.—*Pendleton v. Bell*, 100.
3. *Trust.*—R. P. and his children being jointly interested in land with G. P. and his children, the land was sold in partition and purchased by R. P. for the joint benefit of himself and G. P., no money being paid except the costs, of which each paid one half. R. P. gave G. P. a written acknowledgment, as follows: "I do hereby declare that the purchases which I made, &c., were made for the joint account of G. P. and myself on a verbal agreement between him and me—the deeds of sale are to be made by the commissioner to me. If G. P. wishes to have one half of each tract, I shall execute deeds to him to that purpose; otherwise and until then, whenever I shall sell any part of either, I shall account to him for the one half of the nett proceeds." *Held*, that the trust was a trust for the purpose of converting the land into money, and might as well be executed by the executor of R. P. after the death of G. P. and R. P. as by R. P. himself, no request for a conveyance prior to the sale being shown.—*Paul v. Fulton and Brother-ton*, 110.
4. *Powers.*—By a marriage contract dated July 6, 1842, between W. R., the father of A. R., and A. R. with T. A., it was agreed that all property that said W. R. might give or convey to said A. R. or T. A., or to their use, and the rents, issues and profits thereof, should be held and enjoyed in accordance with the terms of the conveyance or instrument of writing settling such

CONVEYANCES—*Continued.*

property, except as in such contract afterward specially provided. It was further provided by the second article of said contract, that at any time during the marriage the parties to the contract might sell any of the property that might be conveyed by the said W. R. to the said T. A. or A. R., in accordance with the preceding stipulation, except where different provisions should be made by the deed of conveyance, in which case the provisions of the deed should control. The contract provided further, by article 4, that W. R. should purchase and settle upon his daughter A. R., to provide an annual income, productive real estate in the city of St. Louis, to be selected by him, in trust that the income should be paid to the said A. R., or her written order, during her natural life; and in case she should die leaving a child or children surviving her, then the payment to be made to such children until the youngest should attain the age of twenty-one years, at which time the fee should vest in such surviving child or children, &c. But if said A. R. should die without issue, then the absolute estate in said estate should revert to the said W. R. and his heirs. W. R. owning, at the time, a large amount of unproductive real estate, after the marriage, by deed of June 9, 1843, conveyed seven tracts of land in fulfilment of the purposes mentioned in the marriage contract to the said A. R., to hold to her sole use for life, and after her death to such of the children of said Ann as should attain twenty-one years of age, &c. But if the said A. R. died without issue, or issue attaining said age, then the title to revert to said W. R. or his heirs—the limitations prescribed by the deed following generally the stipulations of the contract for the purchase and settlement of income-producing property. Subsequently, W. R. purchased productive real estate, in compliance with the contract, and in satisfaction of the agreement to settle real estate producing income, and settled the same upon his daughter, and she, with her husband, acknowledged that the stipulations of the contract in that respect had been fully complied with. The plaintiffs, as agents for T. A., contracted for the sale of one of the pieces of land conveyed by W. R. to his daughter by their deed of June 9, 1843; and the said T. A. and wife, and the said W. R., joined in a conveyance to the purchaser, who refused to comply with his purchase, alleging that the deed tendered did not pass a good title in fee simple. Upon a suit by the plaintiffs against T. A., to recover the commissions due them for effecting a sale which fell through on account of a defect in the title, *held*, that by virtue of the marriage contract, and the deed of June 9, 1843, that the deed of W. R. and T. and A. A. to the purchaser, was a good and effective deed to pass the fee, and that the sale had not failed from any fault of the defendant.—*Kent & Obear v. Allen*, 87.

5. *Powers*.—A deed, dated March 31, 1810, granted lands to a married woman, to hold to her and her heirs in a direct line, to have, manage and dispose of at her will and pleasure, not be liable to the acts of her husband, it being necessary that said lot should always remain as the property of the children, the heirs of the said wife. *Held*, that the wife took an estate in fee simple with full power to convey the title absolutely.—*English v. Beehle*, 186.

6. *Covenant, not running with the land*.—A covenant by the assignee of a lease,

CONVEYANCES—*Continued.*

with his assignee, that the premises were free and clear of and from taxes, assessments and encumbrances, the failure to pay which exposed the lease to forfeiture, and which was broken as soon as made by the actual liability for taxes and assessments due at the date of the covenant, does not run with the land to the grantee of the second assignee by a deed conveying merely the leasehold premises.—*Woodburn v. Renshaw*, 197.

7. *Tax Sale—Deeds.*—Where the statute required that the sale of lands for taxes should be made before the courthouse door of the county, and the sale was made inside the courthouse, the sale was void and no title passed by the sale and the register's deed thereupon. (*Revenue*, R. C. 1845, p. 949.)—*Rubey v. Huntsman*, 501.
8. *Attachment—Description—Deed.*—The sheriff's return of the levy of an attachment upon the land of the defendant should describe the land with as much certainty as a sheriff's deed.—*Henry v. Mitchell*, 512.
9. *Proof of.*—Under the act of 1804, 1 T. L. p. 47, § 8, it was not necessary that the officer taking the proof by the subscribing witness of the execution of the deed by the grantors, should certify that the witness was known to him.—*Johnson v. Prewitt*, 553.

COUNTY COURT.

See *INJUNCTION*, 1, 2.

1. *Constable.*—The County Court has no power to vacate the office of a constable, nor any general power to do such acts as shall cause his office to become vacant. Neither has it power, by virtue of the statute relating to constables, (R. C. 1855, p. 346, § 3,) to require the constable to give a new bond, because the penalty in the bond previously given was, in the estimation of the court, insufficient. Where, therefore, the County Court, without a notice to show cause, made an order requiring the constable to give a new bond with a larger penalty than his original bond, and subsequently declared his office vacant upon his failure so to do, and a new constable was appointed by the justice of the township, who gave bond; *held*, that the acts of the County Court were void, and that the securities upon the original bond were liable for moneys collected by the constable upon executions after such acts. Although the court, at a subsequent term, revoked its order, and the constable gave an additional bond, the original bond was not discharged by virtue of 4th section of the statute.—*Sheeley v. Wiggs*, 398.

CORONER.

1. *Object of Inquest—Fees.*—The object of a coroner's inquest is to ascertain the cause of the death. The authority of the coroner, in this branch of his office, is necessarily judicial in its character. Being the sole judge as to the propriety or necessity of holding the inquest, his action in that respect is not subject to revision by the county commissioners; and he is entitled to fees under the statute notwithstanding the verdict of the coroner's jury discloses that the deceased died of a natural death, and not by casualty or violence.—*Boisliniere v. Board of Co. Com.*, 375.

COVENANT.

1. *Not running with the land.*—A covenant by the assignee of a lease, with his

COVENANT—*Continued.*

assignee, that the premises were free and clear of and from taxes, assessments and encumbrances, the failure to pay which exposed the lease to forfeiture, and which was broken as soon as made by the actual liability for taxes and assessments due at the date of the covenant, does not run with the land to the grantee of the second assignee by a deed conveying merely the leasehold premises.—*Woodburn v. Renshaw*, 197.

2. *Assignment of right of action.*—To give the grantee in the assignment of a lease a right of action upon the broken covenants of a prior assignee, the right of action upon the breaches of the covenant must be assigned. The verbal promises of the prior assignee to the subsequent assignee to pay the sum due for the breaches of the covenant would be void for want of a consideration between the parties.—*Id.*
3. *Release—Covenant not to sue.*—A judgment was rendered June 7, 1823, in favor of the United States against A and B upon an official bond, in which B was principal and A was security. B died, leaving a widow and a daughter, his only heir. Part of the judgment was levied of the property of A. C, being the owner of lands to which the heir of B set up a claim, obtained a transfer of the judgment from the United States, and procured a revival of the judgment against A and the administrator of B, in March, 1851. The revived judgment was allowed against the estate of B by the St. Louis Probate Court on June 15, 1852, for \$34,772.34, and placed in the fourth class of claims. At the March term, 1852, of said court, a claim in favor of A was allowed against the estate of B for the sum of \$10,244.67, and placed in the fifth class. A compromise was made between C and the heir of B on December 7, 1849, and C made a covenant with the widow and heir of B that he would not use the judgment against the estate and the lands descended, with the exception of the lands claimed and owned by C, and also reserved to himself the right to use the judgment against A and his property. Of this covenant A was cognizant, and by his agent made an agreement with C, and for the consideration of \$4,000 C covenanted with A that he would not use the judgment against A, except to protect his title to the lands specified in the covenant with B's heir. By order of the Probate Court, the lands of B were sold, and at a final settlement there was a balance in the hands of the administrator of B, the proceeds of lands not specified in the covenant, to the amount of \$6,638.55, which the Probate Court ordered to be paid upon the claims allowed in the fourth class, which left nothing for the claim of A. A brought his suit, alleging that the covenant of C with the heir of B was a release of the judgment, which, by collusion and fraud between C and the administrator of B, had been fraudulently revived and allowed, and praying that the judgment of C might be postponed, and that the moneys in the hands of the administrator might be applied to the payment of the claim allowed in favor of A. *Held*, 1. That the covenant of C with the widow and heir of B was not a release of the judgment, and could not have been so pleaded. 2. That although A was a security, yet as he was cognizant of that compromise, and had himself made a similar arrangement with C, he had no equity which gave him a right to require that his claim should be preferred to the judgment of C. (See same case, 27 Mo. 187.)—*Hempstead v. Hempstead*, 135.

CRIMES AND PUNISHMENTS.

SEE CRIMINAL PRACTICE.

1. *Sunday—Contract.*—No damages can be recovered for a breach of contract for unnecessary labor to be done on Sunday, such as playing music at a beer-garden. (R. C. 630, § 33.)—*Bernard v. Lüpping*, 341.
2. *Disturbance of Worship.*—To constitute the offence of disturbing religious worship, under the act, R. C. 1855, p. 630, § 30, it must appear that the acts charged as constituting the offence took place when the congregation were assembled for worship.—*State v. Edwards*, 518.
3. *Misdemeanors.*—Whatever act openly outrages decency and is injurious to public morals, is a misdemeanor at common law, and is indictable as such.—*State v. Reuben Rose*, 560.
4. *Larceny.*—The defendant was indicted for feloniously stealing cattle which had been levied upon by the sheriff by virtue of an execution against the defendant and committed to the custody of a third party for safe keeping. *Held*, that the State was bound to show affirmatively that the defendant knew of the execution and seizure of the cattle by the sheriff, so as to show a felonious intent in the taking.—*State v. Dewitt*, 571.

D

DAMAGES.

1. *Tenant.*—If a tenant be ejected by the landlord, he can only recover damages for the unexpired portion of his term.—*Schlemmer v. North*, 206.
2. *Officer.*—In an action against an officer for carelessly taking insolvent securities to a bond for the return of personal property taken and delivered by order of a court, the officer is liable only for the damages actually sustained by the party, and not for the amount of the judgment recovered against the principal on the bond in the original suit. Where the defendant in the original suit claimed to retain possession as security for the freight and charges upon the property taken, he could not recover against the officer if the amount of his claim had been paid him.—*Mortland v. Smith*, 225.
3. *Evidence of.*—In an action against an officer for neglect of duty in taking a delivery bond, the record of the judgment in the suit in which the bond was taken will be evidence against the officer that said judgment had been rendered, but not of the amount of damage sustained.—*Id.*
4. *Contract—Measure.*—When the defendants, who had been sued for a breach of the plaintiff's patent for putting up cemented hams, agreed with the plaintiff that if he would dismiss the suit against them, and allow them the partial use of the patent for the year, they would not manufacture or put up cemented hams of any kind during the existence of the patent; *held*, that, in an action upon such contract, the measure of damages was properly declared to be the amount the plaintiff's hams had depreciated in price by the cemented hams put up and sold for defendants after the expiration of the year mentioned in the contract, and before the commencement of this suit.—*Billings v. Ames*, 265.
5. *Measure.*—The measure of damages for the taking and detention of personal property will be the actual damages sustained by the seizure; the question of speculative profit or loss cannot enter into the estimate. Where a steamboat was seized, *held*, that the jury should not be allowed to speculate as to what might be the probable or expected profits or earnings of the boat.

DAMAGES—*Continued.*

- (Taylor v. Maguire, 12 Mo. 313, cited and approved.)—Callaway Min'g & Man'g Co. v. Clark, 305.
6. *Special contract.*—Where the plaintiff specially contracted with the defendant to serve the defendant for a definite service, at a fixed price, and before the completion of his contract voluntarily and without cause left the employment of the defendant, he can recover nothing for his services. (Posey v. Garth, 7 Mo. 96; Dickson v. Caldwell, 17 Mo. 575; and Schneer v. Lemp, 19 Mo. 40. Approved.)—Henson v. Hampton, 408.

DOWER.

1. *Limitations.*—The act limiting actions for the recovery of real estate, of February 24, 1847, and the same act R. C. 1855, p. 1045, does not include the limitation of suits for dower.—Littleton v. Patterson, 357.
2. *Fraud—Will.*—Voluntary deeds in the nature of a will made with the intent to deprive a wife of her dower, would be, as to her, fraudulent and void. (S. C. 29 Mo. 350.)—Tucker v. Tucker, 464.

E

EJECTMENT.

See LANDS AND LAND TITLES. CONVEYANCES. LIMITATIONS, 5.

1. *Judgment, bar of.*—A judgment in an action of ejectment is no bar to the prosecution of another suit for the recovery of the same premises. The provision of R. C. 1855, p. 695, § 33, was repealed by act of November 21, 1857. (Acts 1857, p. 34.)—Slevin v. Brown, 176.
2. *Trustee—Wife's Estate.*—Where the legal title in a leasehold estate in lands was vested in a trustee for the benefit of the wife, the death of the wife will not prevent the trustee from recovering the possession of the property in ejectment. The legal title remains in the trustee.—*Id.*

EQUITY.

1. *Mistake—Specific Performance.*—When a contract for the sale of land had been executed by the vendor by his delivery of a deed to the purchaser, in which the grantee was misdescribed by the name of *John*, when his true name was *James*, the vendee was not entitled to bring his action to enforce a specific performance of the contract, but should have filed his petition in equity to correct the mistake in the deed in the description of the grantee.—Colt v. Beaumont, 118.
2. *Mistake.*—A court of equity will reform an instrument which, by reason of a mistake, fails to execute the intention of the parties, as well upon an equitable defence set up in an answer, as in a suit brought directly for that purpose. (Leitensdorfer v. Delphy, 15 Mo. 160, affirmed.)—Hook, Adm'r, v. Craighead, 405.
3. *Note—Endorsee.*—The endorsee of a negotiable note, endorsed to him after maturity, takes it subject to the equities existing between the maker and endorser.—Farris v. Catlett, 469.
4. *Note—Equity.*—An answer setting forth that the note sued upon was endorsed to the holder after maturity as a collateral security, and with notice of an agreement between the maker and payee that the note was to be delivered to trustees to pay off encumbrances upon lands in consideration of

EQUITY—*Continued.*

the purchase of which the note was given, presents a defence in equity which it was error to strike out and give judgment for the plaintiff.—*Id.*

5. *Notice.*—The clerk of a Circuit Court in which a suit for specific performance of a contract for the sale of land is pending, thereby has notice of the nature of the claim of plaintiff.—*Dickerson v. Campbell*, 544.

ERROR.

See PRACTICE, CIVIL, 21, 24, 25, 30, 31, 32, 34, 35, 36, 37.

ESTOPPEL.

1. *In pais*.—*Mortgage.*—Where the party beneficially interested in lands sold under a deed of trust to secure a debt, the sale of which was voidable because the lands were put up in a lump, subsequently induces a third party to purchase the lands from the vendee at the trustee's sale, he cannot afterward be allowed to attack the validity of the sale.—*Taylor's Heirs v. Elliott*, 172.
2. *Recitals.*—Where, in a deed conveying an unconfirmed claim to land, without any warranty of title, both parties had recited that the grantors in the deed were the owners of the claim as the only surviving heirs and devisees of the assignee by purchase from the original claimant, they are estopped from denying the truth of such recitals.—*Clamorgan v. Greene*, 285.

EVIDENCE.

1. *Public Acts.*—The acts of Congress confirming claims to land in Missouri are public not private acts, and will be judicially noticed without being read in evidence.—*Papin v. Ryan et al.*, 21.
2. *Ancient Deeds.*—*Boyle v. Meegan*, 19 How. 149, and *Reaume v. Chambers*, 22 Mo. 36, 53, cited and affirmed. Where the deed of a married woman was not executed in conformity with the law in force at the date of its execution so as to convey her estate, it will not become effective as an ancient deed from lapse of time.—*Boyle v. Chambers*, 46.
3. *Practice.*—When the plaintiff reads in evidence a portion of an answer of defendant, he must read the whole of a sentence, and not omit that part which qualifies the statement read.—*Bompart v. Lucas*, 123.
4. *Variance.*—The plaintiff claiming to be a corporation by the laws of New York, sued by the name of "The Bank of Commerce." The articles of association produced to prove the plaintiff's right to sue as a corporation declared that the name to be used should be "Bank of Commerce, in New York." *Held*, that the articles offered were not competent evidence to prove the existence of a corporation bearing the name of the plaintiff.—*Bank of Commerce v. Mudd*, 218.
5. *Records.*—In an action against an officer for neglect of duty in taking a delivery bond, the record of the judgment in the suit in which the bond was taken will be evidence against the officer that said judgment had been rendered, but not of the amount of damage sustained.—*Mortland v. Smith*, 225.
6. *Records.*—Records are evidence for or against those only who are parties or privies thereto. Upon an issue upon a plea in abatement in an attachment, it was erroneous to permit the defendant to read in evidence the record of suits between other parties, involving the validity of a conveyance made

EVIDENCE—*Continued.*

- by the defendant, alleged to have been fraudulent.—*Norcross v. Hudson*, 227.
7. *Objection—Reasons.*—Where an objection is made to the admission of evidence in the court below, the reason of the objection must be stated, or the matter will not be reviewed by the Supreme Court.—*Knipper v. Bechtner*, 255.
8. *Witness.*—It was improper to permit witness to state that it was *not* the custom to make contracts of a particular character, which were not illegal and which the parties were competent to make.—*Goodfellow's Ex'rs v. Meegan*, 280.
9. *Writings.*—When the defendant alleged that he had been deceived by the fraudulent misrepresentations of the plaintiffs, an unexecuted agreement between plaintiffs and defendant, which the latter had taken to his attorney for the purpose of having a proper agreement drawn, was correctly admitted in evidence in connection with other testimony, to show that defendant knew the facts which he alleged had been fraudulently concealed by the plaintiffs.—*Clamorgan v. Greene*, 285.
10. *Lost Instrument.*—The testimony of a party to prove the loss of an instrument may be taken by deposition with the same effect as if he had been placed upon the stand. But the affidavit of the party to prove such loss is inadmissible. Before such testimony can be admitted, the previous existence of the instrument must be shown by other evidence.—*Gould v. Trowbridge*, 291.
11. *Absconding.*—The fraudulently disposing of his goods in a clandestine manner, is evidence against a party against whom an attachment issues, on the ground that the defendant has absconded, for the purpose of showing the intent of the absence.—*Ross v. Clark*, 296.
12. *Lost Writings.*—Evidence of the contents of letters cannot be given until their absence is accounted for, and the inability to produce them shown.—*Farrell's Adm'r v. Brennan's Adm'r*, 328.
13. *Sanity of Testator.*—Witnesses acquainted with testator may state their opinions as to his sanity, but should not be asked "if they thought his mind sound enough to make a will," as that would involve a question of law for the court to determine, and not the witness.—*Id.*
14. *Relevancy.*—The testimony admitted upon trial must be relevant to the issues submitted to the jury.—*Eddy v. Baldwin*, 369.
15. *Declarations.*—The declarations of the maker of a deed attacked for fraud are not evidence in favor of those claiming under such deed.—*Tucker v. Tucker*, 464.
16. *Corporation—Entries.*—Where the defendant, sued as a corporation, pleaded that it had not organized under the acts of incorporation, the book of entries containing the articles of the association signed by the associates, and the record of the proceedings, was properly admitted in evidence to prove the actual organization of the corporation.—*Foster v. White Cloud City Co.*, 505.
17. *Date of Deeds.*—In a suit by the landlord against his tenant for breach of covenant of the lease to cultivate the land in a husbandlike manner, evidence was properly admitted to prove that the lease was executed on a different day from that stated in the instrument.—*Hall v. Hoffman*, 519.

EVIDENCE—*Continued.*

18. *Declarations.*—Declarations made by the endorser of a bill of exchange, or note, affecting the validity of the bill, and not known to the endorsee, are not evidence against the endorsee.—*Blancjour v. Tutt*, 576.

EXECUTION.

1. *Lien of Execution.*—Upon the receipt of an execution by the officer, the lien of the writ attaches to the personal property of the defendant, and a levy and sale will pass the title notwithstanding a transfer by the judgment debtor made after such receipt. The lien attaches in the same manner to property acquired by the debtor after the execution comes into the hands of the officer. (R. C. 1855, p. 964.)—*State*, to use of *Beazley v. Blundin*, 387.
2. *Levy—Execution Sale.*—When a tract of land has been laid out into blocks and lots, with streets and alleys dedicated to the public use, and some of the lots have been sold to third parties, an attachment subsequently levied upon the tract, by its description before subdivision, will be a nullity; and an execution sale, under the judgment in the attachment suit, will not convey the title.—*Henry v. Mitchell*, 512.
3. *Attachment—Description—Deed.*—The sheriff's return of the levy of an attachment upon the land of the defendant should describe the land with as much certainty as a sheriff's deed.—*Id.*
4. *Limitation—Practice.*—The statute of limitations may be set up by the sheriff as a defence to a motion for judgment against him under sec. 67 of the act respecting Executions, R. C. 1855, p. 751, without being specially pleaded.—*Mitchell v. Fulbright*, 551.

F

FEES.

1. *Clerks.*—The act of January 25, 1861, (Acts 1860-61, p. 31,) in relation to fees, was not repealed by the act of March 28, 1861, (Acts 1860-61, p. 30.)—*State, ex rel. McDermott v. Auditor*, 222.
2. *Circuit Attorney.*—The circuit attorney, for prosecuting or defending suits for or against one of the counties of his circuit, is entitled to no greater compensation than that allowed by the statute. (R. C. 1855, p. 756, § 2, and p. 275, § 13.)—*Freeman v. Henry County*, 446.

FORCIBLE ENTRY AND DETAINER.

1. *Parties.*—The action of forcible entry and detainer must be brought against the party in actual possession of the premises at the time of suit brought. (R. C. 1855, p. 1787.)—*Orrick v. St. Louis Public Schools*, 315.

FRAUDS, STATUTE OF.

See ATTACHMENTS.

FRAUDULENT CONVEYANCES.

1. *Solvency.*—The solvency required by law, which will sustain a voluntary deed, consists not only in the present ability of the debtor to pay his debts, but in such a condition of his means that payment can be enforced by process of law.—*Eddy v. Baldwin*, 369.
2. *Absconding—Evidence.*—The fraudulently disposing of his goods in a clandestine manner, is evidence against a party against whom an attachment is-

FRAUDULENT CONVEYANCES—*Continued.*

- sues on the ground that the defendant has absconded, for the purpose of showing the intent of the absence.—*Ross v. Clark*, 296.
3. *Fraud—Will.*—Voluntary deeds in the nature of a will made with the intent to deprive a wife of her dower, would be, as to her, fraudulent and void. (S. C. 29 Mo. 350.)—*Tucker v. Tucker*, 464.

G

GUARDIAN AND WARD.

1. *Disbursements.*—If a guardian voluntarily disburse on account of his ward a sum greater than the ward's estate, he has no recourse upon the ward for the overplus unless there be a special promise to pay it. (*Wyatt v. Woods*, 31 Mo. 351, affirmed.)—*Frost v. Winston*, 489.
2. *Accounts—Interest.*—Where a guardian had moneys of his ward, and had lent or could have lent the same at the highest legal rate of interest, when called to account he will be properly charged with that rate, with annual rests, but should be allowed a reasonable commission as the guarantor of payment.—*Id.*
3. *Possession of.*—The possession of the goods and chattels of the ward by the guardian, is the possession of the ward. He acts in a merely fiduciary capacity, and is the agent of the ward in all matters relating to the trust property.—*Sallee v. Arnold*, 532.

H

HUSBAND AND WIFE.

1. *Wife's Estate in Lands.*—The husband cannot, in this State, by his deed, alien the estate of his wife in lands without her consent.—*Boyle v. Chambers*, 46.
2. *Paraphernalia.*—The husband could not, by the Spanish law, alienate the wife's paraphernal property without her consent.—*Id.*
3. *Wife's Estate.*—Where the legal title in a leasehold estate in lands was vested in a trustee for the benefit of the wife, the death of the wife will not prevent the trustee from recovering the possession of the property in ejectment. The legal title remains in the trustee.—*Slevin v. Brown*, 176.
4. *Wife's Estate, liability of.*—Property had been conveyed to trustees to the sole use of a married woman, &c., "and to such uses and purposes, and in such manner as she might, in writing, appoint." Subsequently she became endorser of a negotiable promissory note. *Held*, that such endorsement was an appointment in writing, and that she thereby charged her separate estate.—*Clafin v. Van Wagoner et al.*, 252.
5. *Pleading—Parties.*—Where the action concerns the separate property of the wife, she must sue or defend by her next friend, without joining the husband. (R. C. 1855, p. 1218, Practice, Art. II., § 7.)—*Id.*
6. *Pleading—Parties.*—Where it is sought to charge the wife's separate estate with her debts, her trustee is a proper party defendant, so that in case of sale the legal title may be conveyed. (R. C. 1855, p. 1218, § 4.)—*Id.*
7. *Ward.*—Where a female ward marries, the marital rights of the husband attach to the goods and chattels of the ward in the possession of the guardian, and he may demand and recover the same although the wife die before he obtain the actual possession.—*Sallee v. Arnold*, 532.

I

INJUNCTION.

1. *State—Party.*—The State cannot properly be made a party plaintiff, at the relation of a private citizen, to a bill of injunction to restrain the County Court of a county from issuing its bonds or levying a tax to pay for a subscription to the stock of a railroad company. The State has no interest, legal or equitable, in the subject matter.—*State, to use, v. Parkville and Grand River Railroad Co.*, 496.
2. *Against levying Tax.*—An injunction will not be granted, at the instance of a tax-payer, to restrain a County Court from levying a tax, upon the ground that the court had no jurisdiction, and that its action was a nullity. It must appear that the injury to the tax-payers would be irreparable, or such as could not be redressed by action at law. (*Sayre v. Tompkins*, 23 Mo. 443, affirmed.)—*Id.*

INSOLVENT.

1. *Sale—Assignment.*—The bankrupt and insolvent laws of each State or nation bind and affect their own citizens, and as against them will be enforced by the courts of other States when questions arise as to the title conveyed under such laws. Therefore, where plaintiffs and defendants were citizens of Louisiana, and the defendants had made an assignment of their property in accordance with the laws of that State for the benefit of their creditors, and a syndic or assignee had been appointed to collect and distribute the assets of the insolvents, one of the creditors, a citizen of, and residing in that State, cannot secure a preference over the remaining creditors in his own State by process of attachment against the property and assets of the insolvents in this State. As against such attachment, the title of the assignee of the insolvents will prevail.—*Einer v. Beste & Deynood*, 240.
2. *Fraud—Solvency.*—The solvency required by law, which will sustain a voluntary deed, consists not only in the present ability of the debtor to pay his debts, but in such a condition of his means that payment can be enforced by process of law.—*Eddy v. Baldwin*, 369.

INTEREST.

1. *Guardian—Accounts.*—Where a guardian had moneys of his ward, and had lent or could have lent the same at the highest legal rate of interest, when called to account he will be properly charged with that rate, with annual rests, but should be allowed a reasonable commission as the guarantor of payment.—*Frost v. Winston*, 489.

J

JUDGMENT.

See PRACTICE, CIVIL, 29, 30, 31, 32, 35, 36, 37, 38.

1. *Ejectment—Judgment, bar of.*—A judgment in an action of ejectment is no bar to the prosecution of another suit for the recovery of the same premises. The provisions of R. C. 1855, p. 695, § 33, was repealed by act of November 21, 1857. (Acts 1857, p. 34.)—*Slevin v. Brown*, 176.

JURISDICTION.

See OFFICER QUO WARRANTO.

1. *Waiving demand*.—A party may waive part of his demand for the purpose of giving jurisdiction to an inferior court. (*Hempler v. Schneider*, 17 Mo. 258, and *Denny v. Eckelkamp*, 30 Mo. 146, affirmed.)—*Matlack v. Lare*, 262.
2. *State Courts—Patent*.—The courts of the State have jurisdiction in cases of contracts in which patents are brought in collaterally. When the defendants, who had been sued for a breach of the plaintiff's patent for putting up cemented hams, agreed with the plaintiff that if he would dismiss the suit against them, and allow them the partial use of the patent for the year, they would not manufacture or put up cemented hams of any kind during the existence of the patent; *held*, that the suit upon such contract was properly brought in the State courts.—*Billings v. Ames*, 265.
3. *Constable—County Court*.—The County Court has no power to vacate the office of a constable, nor any general power to do such acts as shall cause his office to become vacant. Neither has it power, by virtue of the statute relating to constables, (R. C. 1855, p. 346, § 3,) to require the constable to give a new bond, because the penalty in the bond previously given was, in the estimation of the court, insufficient. Where, therefore, the County Court, without a notice to show cause, made an order requiring the constable to give a new bond with a larger penalty than his original bond, and subsequently declared his office vacant upon his failure so to do, and a new constable was appointed by the justice of the township, who gave bond; *held*, that the acts of the County Court were void, and that the securities upon the original bond were liable for moneys collected by the constable upon executions after such acts. Although the court, at a subsequent term, revoked its order, and the constable gave an additional bond, the original bond was not discharged by virtue of 4th section of the statute.—*Sheeley v. Wiggs*, 398.

JURORS.

1. *Practice—Crimes*.—A juror who has formed or declared an opinion upon the matter in issue is competent to serve, if the opinion was founded only on rumor and did not bias or prejudice his mind. (R. C. 1855, p. 1191, § 14.)—*State v. Rose*, 346.

JUSTICES' COURTS.

1. *Appeals*.—A non-resident of the county against whom a judgment by default is rendered by a justice of the peace, must move to set aside the judgment within ten days from its rendition. The provision allowing the non-resident twenty days further in which to take his appeal, by § 3, art. 9, Justices' Courts, R. C. 1855, p. 671, does not apply to the application for setting aside the default.—*Blanchard v. Hatch*, 261.
2. *Appeal*.—Upon an appeal from a judgment of a justice, in a suit by attachment, the defendant may, in the Circuit Court, plead in abatement of the attachment, although he may have defended upon the merits before the justice. (R. C. 1855, p. 975.)—*Phillips v. Bliss*, 427.

L

LANDLORD AND TENANT.

1. *Freehold*.—Buildings erected upon land become part of the freehold, and do not belong to the tenant.—*Schlemmer v. North*, 206.

LANDLORD AND TENANT—*Continued.*

2. *Ejectionment*.—If a tenant be ejected by the landlord, he can only recover damages for the unexpired portion of his term.—*Id.*
3. *Wife's Estate*.—Where the legal title in a leasehold estate in lands was vested in a trustee for the benefit of the wife, the death of the wife will not prevent the trustee from recovering the possession of the property in ejectionment. The legal title remains in the trustee.—*Slevin v. Brown*, 176.

LAND AND LAND TITLES.

1. *Survey*.—The confirmation of a common field lot by virtue of the act of Congress of April 29, 1816, is a complete grant from the date of the act, and a survey is not required to fix the location and vest the title to the specific tract confirmed.—*McCune v. O'Fallon*, 13.
2. *Limitations*.—The statute of limitations in favor of an adverse possession of a field lot confirmed by the second section of the act of Congress of April 29, 1816, commences to run from the time of possession taken and before a survey of the claim by the United States. (*Aubuchon v. Ames*, 27 Mo. 98; *St. Louis University v. McCune*, 28 Mo. 481, affirmed.) Query, before survey, how can the proper location of lines be determined?—*Id.*
3. *Schools*.—A confirmation under the act of Congress of July 4, 1836, to land within the out-boundary survey of the town of St. Louis, is a title, notwithstanding the reservation to the use of schools under the acts of June 13, 1812, and January 27, 1831, and a mere trespasser cannot defend against it.—*Papin v. Ryan*, 21.
4. *Survey*.—Until the lands reserved for schools by the act of 1812, and granted by the act of 1831, are designated and set apart by the surveyor general, the grant made by those acts does not attach to any particular land.—*Id.*
5. *State—Title*.—The State of Missouri, by virtue of its sovereignty, does not acquire title to the islands that have formed in the Mississippi river since the admission of the State into the Union.—*Adams v. City of St. Louis*, 25.
6. *Patent, younger to support an equity against an elder title*.—It having been decided in the case of *Kissell v. St. Louis Public Schools*, 16 Mo. 553, and 18 How. R. 19, that the entry of Robert Duncan as preceptor of fractional section 26, township 45 north, range 7 east of the 5th principal meridian, under which the plaintiff claims the land in suit, was void; he shows no title, either in law or equity, upon which he can impeach the defendant's title under the acts of 1812 and 1831. (See *Magwire v. Tyler*, 30 Mo. 202, and 25 How.)—*Evans v. St. Louis Public Schools*, 27.
7. *Confirmation*.—Acts 1812 & 1816. A confirmation by virtue of the first section of the act of Congress of June 13, 1812, is a better title than a confirmation under the act of April 29, 1816.—*Barry v. Blumenthal*, 29.
8. *Survey*.—The private claims within the village of Carondelet, although included within the survey, must be understood to be excepted from the confirmation of commons to the town, and it was properly left to the jury to find whether the premises sued for had been used by the inhabitants as a part of the common of the village.—*Id.*
9. *Confirmation*.—A confirmation by the board of commissioners under the act of Congress of March 3d, 1807, is a better title than a confirmation by virtue of the 1st section of the act of June 13, 1812.—*Hogan v. Page*, 68.
10. *Enurement*.—*Hogan v. Page*, 22 Mo. 55, affirmed. When the board of com-

LAND AND LAND TITLES—*Continued.*

- missioners, under the act of Congress of March 3d, 1807, issued a certificate of confirmation to the legal representatives of the grantee under the French Government, and not to the party who presented the claim, the certificate does not enure to the benefit of the claimant unless he prove himself to be the assignee or legal representative of the person in whose name the certificate issued.—*Id.*
11. *Wife's Estate in Lands.*—The husband cannot, in this State, by his deed, alien the estate of his wife in lands without her consent.—*Boyle v. Chambers*, 46.
 12. *Paraphernalia.*—The husband could not, by the Spanish law, alienate the wife's paraphernal property without her consent.—*Id.*
 13. *Wife's Estate.*—Where the legal title in a leasehold estate in lands was vested in a trustee for the benefit of the wife, the death of the wife will not prevent the trustee from recovering the possession of the property in ejectment. The legal title remains in the trustee.—*Slevin v. Brown*, 176.
 14. *Mechanic's Lien—Title.*—Parties interested in property subject to a mechanic's lien, who are not made parties to the suit to enforce the lien, may, in a suit upon the title under the lien, object to the regularity of the proceedings.—*Hauser v. Hoffman*, 334.
 15. *Mechanics' Liens—Limitation.*—The act of February 14, 1857, relating to mechanics' liens in St. Louis county (Acts 1856-7, p. 668), requiring suits upon liens to be commenced within ninety days after the filing of the lien, applied to liens previously filed under the law of 1855 (R. C. 1855, p. 1064), so as to require suits to be commenced within ninety days after the passage of that act. The plaintiff not having sued upon the lien within ninety days, acquired no title, under the sheriff's sale, upon the lien and judgment, as against parties interested in the land, not parties to the suit to enforce the lien.—*Id.*
 16. *Limitations.*—The act limiting actions for the recovery of real estate, of February 24, 1847, and the same act, R. C. 1855, p. 1045, does not include the limitation of suits for dower.—*Littleton v. Patterson*, 357.
 17. *Tax Sale—Deeds.*—Where the statute required that the sale of lands for taxes should be made before the courthouse door of the county, and the sale was made inside the courthouse, the sale was void and no title passed by the sale and the register's deed thereupon. (Revenue, R. C. 1845, p. 949.)—*Rubey v. Huntsman*, 501.
 18. *Levy—Execution Sale.*—When a tract of land has been laid out into blocks and lots, with streets and alleys dedicated to the public use, and some of the lots have been sold to third parties, an attachment subsequently levied upon the tract, by its description before subdivision, will be a nullity; and an execution sale, under the judgment in the attachment suit, will not convey the title.—*Henry v. Mitchell*, 512.
 19. *Levy—Description—Deed.*—The sheriff's return of the levy of an attachment upon land of the defendant should describe the land with as much certainty as a sheriff's deed.—*Id.*
 20. *Swamp Lands—Tender of Deed.*—By the fourth section of the act concerning swamp lands (Acts 1850-1, p. 229), the county is not required to tender a deed before demanding or suing the purchaser of such lands for the amount due upon his purchase.—*Andrew Co. v. Craig*, 528.

LIMITATIONS.

1. *Confirmations*.—The statute of limitations in favor of an adverse possession of a field lot confirmed by the second section of the act of Congress of April 20, 1816, commences to run from the time of possession taken and before a survey of the claim by the United States. (*Aubuchon v. Ames*, 27 Mo. 98; *St. Louis University v. McCune*, 28 Mo. 481, affirmed.) Query, before survey, how can the proper location of lines be determined?—*McCune v. O'Fallon*, 13.
2. *Mechanics' Liens*.—The act of February 14, 1857, relating to mechanics' liens in St. Louis county (Acts 1856-7, p. 668), requiring suits upon liens to be commenced within ninety days after the filing of the lien, applies to liens previously filed under the law of 1855 (R. C. 1855, p. 1064), so as to require suits to be commenced within ninety days after the passage of that act. The plaintiff not having sued upon the lien within ninety days, acquired no title, under the sheriff's sale, upon the lien and judgment, as against parties interested in the land, not parties to the suit to enforce the lien.—*Hauser v. Hoffman*, 334.
3. *Prescription—Confirmation by Act of 1816*.—*Aubuchon v. Ames*, 27 Mo. 89; *St. Louis University v. McCune*, 28 Mo. 481, and *McCune v. O'Fallon*, 32 Mo., affirmed.—*Barry v. Blumenthal*, 29.
4. *Adverse Possession*.—In an action by a purchaser under a judgment, execution and sheriff's sale, against defendants in possession under a deed from the judgment debtor, alleged to be fraudulent as against creditors, the statute commences to run from the date of the possession taken under the fraudulent deed.—*Walker v. Bacon*, 144.
5. *Disability*.—Where the statute of limitations has run against a claim to land by tenants in common, if they join in the action, the disability of one tenant will not avail his co-tenant, but both will be barred. (*Keeton's heirs v. Keeton's administrator*, 20 Mo. 530-544, affirmed.) See note at end of the case.—*Id.*
6. *Possession, adverse*.—The possession by a defendant, who has, by deeds and partitions, acknowledged the title of the plaintiff, cannot be considered adverse to such title.—*Tomlinson v. Lynch*, 160.
7. *Dower*.—The act limiting actions for the recovery of real estate, of February 24, 1847, and the same act, R. C. 1855, p. 1045, do not include the limitation of suits for dower.—*Littleton v. Patterson*, 357.
8. *Sheriff*.—An action against a sheriff upon a liability incurred by the doing of an official act, or by the omission of an official duty, is barred by failure to prosecute within three years. (R. C. 1855, p. 1048, § 4.)—*Mitchell v. Fulbright*, 551.
9. *Possession, extent of*.—Where a party enters into the possession of land claiming title by deed, his possession by law will be co-extensive with the boundaries stated in his deed.—*Johnson v. Prewitt*, 553.
10. *Possession, adverse*.—The possession of land which bars the legal title must be a hostile possession.—*Id.*

M

MECHANICS' LIENS.

1. *Description*.—For the purpose of enforcing a mechanic's lien, the real es-

MECHANICS' LIENS—*Continued.*

- tate upon which the buildings are erected must be described with such certainty as to identify it.—*Matlack v. Lare*, 262.
2. *Parties.*—*Title.*—Parties interested in property subject to mechanic's lien, who are not made parties to the suit to enforce the lien, may, in a suit upon the title under the lien, object to the regularity of the proceedings.—*Hauser v. Hoffman*, 334.
 3. *Limitations.*—The act of February 14, 1857, relating to mechanics' liens in St. Louis county (Act 1856-7, p. 668), requiring suits upon liens to be commenced within ninety days after the filing of the lien, applied to liens previously filed under the law of 1855 (R. C. 1855, p. 1064), so as to require suits to be commenced within ninety days after the passage of that act. The plaintiff not having sued upon the lien within ninety days, acquired no title, under the sheriff's sale, upon the lien and judgment, as against parties interested in the land, not parties to the suit to enforce the lien.—*Id.*

MORTGAGES AND DEEDS OF TRUST.

1. *Estoppel in pais.*—Where the party beneficially interested in lands sold under a deed of trust to secure a debt, the sale of which was voidable because the lands were put up in a lump, subsequently induces a third party to purchase the lands from the vendee at the trustee's sale, he cannot afterward be allowed to attack the validity of the sale.—*Taylor's Heirs v. Elliott*, 172.
2. *Maturing of Debt.*—Where the defendant had become security upon notes given in consideration of lands sold to the principal, and the principal subsequently executed a deed of trust to secure payment of the same notes, which deed contained a proviso that in case of default for thirty days in the payment of any one of the notes, all the notes should become due and payable, and that the trustees might proceed to sell the lands and pay all of said notes, whether due on their face or not; *held*, 1. That by the terms of the deed the notes became due only so far as to authorize a payment from the proceeds of sale, and that no suit could be prosecuted upon them until they matured.—*Morgan v. Martien*, 438.

O

OFFICERS.

See CONSTABLE. EXECUTION. SHERIFF.

1. *Possession.*—When a constable of St. Louis county had levied upon a slave by virtue of executions from a justice of the peace, and upon a claim of property made by a claimant had taken a bond of indemnity from the plaintiffs in the executions, in accordance with the statute, and had placed the slave in the possession of defendant as bailee; *held*, that the possession of the bailee was that of the constable; and that an action for the delivery of the slave could not be maintained against the bailee.—*Hambleton v. Lynch*, 259.
2. *Coroner.*—The object of a coroner's inquest is to ascertain the cause of the death. The authority of the coroner, in this branch of his office, is necessarily judicial in its character. Being the sole judge as to the propriety or

OFFICERS—*Continued.*

necessity of holding the inquest, his action in that respect is not subject to revision by the county commissioners; and he is entitled to fees under the statute notwithstanding the verdict of the coroner's jury discloses that the deceased died of a natural death, and not by casualty or violence.—*Boisliniere v. Board of County Commissioners*, 375.

3. *Constable—Jurisdiction.*—The County Court has no power to vacate the office of a constable, nor any general power to do such acts as shall cause his office to become vacant. Neither has it power, by virtue of the statute relating to constables, (R. C. 1855, p. 346, § 3,) to require the constable to give a new bond, because the penalty in the bond previously given was, in the estimation of the court, insufficient. Where, therefore, the County Court, without a notice to show cause, made an order requiring the constable to give a new bond with a larger penalty than his original bond, and subsequently declared his office vacant upon his failure so to do, and a new constable was appointed by the justice of the township, who gave bond; *held*, that the acts of the County Court were void, and that the securities upon the original bond were liable for moneys collected by the constable upon executions after such acts. Although the court, at a subsequent term, revoked its order, and the constable gave an additional bond, the original bond was not discharged by virtue of 4th section of the statute.—*Sheeley v. Wiggs*, 398.

P

PARTNERSHIP.

1. *Contract.*—A partnership contract which would be good without a seal will still be valid as a simple contract, although the partner who executed the instrument had no special authority to put the partnership name to such paper.—*Human v. Cuniffe*, 316.

PAYMENT.

1. *Application.*—A banker is not required by law to apply a balance due by him on account current to his depositor to the payment of a liability from his customer to himself upon a bill or note. In a suit by the banker against the acceptor of a bill, the fact that the drawer had an account with the banker, and that after protest of the bill there were balances in favor of the drawer, would not be evidence in favor of the acceptor to show a payment or satisfaction by the drawer.—*Citizens' Bank, &c., v. Carson*, 191.
2. *Application.*—Where the collector of the revenue, in his settlement with the County Court, had settled his account, as made out by the county clerk, without objection, he admits that the payments have been properly applied, and his securities will be bound thereby. (S. C., 26 Mo. 226.)—*State, use of Buchanan Co., v. Smith*, 524.

PRINCIPAL AND AGENT.

1. *Boats and Vessels—Power of Master.*—The master of a boat in the home port has no authority as master to give bond and procure security for the discharge of the boat under the 14th section of the act relating to boats and vessels, (R. C. 1855, p. 307,) so as to bind the owners to reimburse the security for such sums as he may be compelled to pay. He is not the agent

PRINCIPAL AND AGENT—*Continued.*

- of the owners for such a purpose, and they will not be liable unless they recognize or ratify his acts in some manner.—*Carr v. Burke*, 233.
2. *Boats—Power of Master.*—The master of a steamboat may, in the home port, in his capacity of agent, employ persons to serve on the boat, and contract for the necessary stores and supplies.—*Id.*
 3. *Note.*—Where an agent executed a note in the name of his principal, the principal will be bound if the agent had authority to give such note, or the principal afterward ratified his act.—*Human v. Cuniffe*, 316.
 4. *Evidence.*—Where an agent was appointed to receive for a special purpose and pay out moneys as he should be directed by his principal, evidence that he had received money which he refused to pay to his principal when demanded was erroneously excluded from the consideration of the jury.—*Henry County v. Allen*, 486.

POSSESSION.

1. *Officer.*—When a constable of St. Louis county had levied upon a slave by virtue of executions from a justice of the peace, and upon a claim of property made by a claimant had taken a bond of indemnity from the plaintiffs in the executions, in accordance with the statute, and had placed the slave in the possession of defendant as bailee; *held*, that the possession of the bailee was that of the constable; and that an action for the delivery of the slave could not be maintained against the bailee.—*Hambleton v. Lynch*, 259.
2. *Adverse.*—The possession by a defendant, who has, by deeds and partitions, acknowledged the title of the plaintiff, cannot be considered adverse to such title.—*Tomlinson v. Lynch*, 160.
3. *Guardian and Ward.*—The possession of the goods and chattels of the ward by the guardian, is the possession of the ward. He acts in a merely fiduciary capacity, and is the agent of the ward in all matters relating to the trust property.—*Sallee v. Arnold*, 532.
4. *Husband and Wife.*—Where a female ward marries, the marital rights of the husband attach to the goods and chattels of the ward in the possession of the guardian, and he may demand and recover the same although the wife die before he obtain the actual possession.—*Sallee v. Arnold*, 532.
5. *Bailment.*—If the guardian hire out the slaves of the ward, the possession of the bailee is, as between guardian and ward, the possession of the guardian.—*Id.*
6. *Possession adverse.*—The possession of land which bars the legal title must be a hostile possession.—*Johnson v. Prewitt*, 553.

POWERS.

See CONVEYANCES, 2, 3, 4.

PRACTICE, CRIMINAL.

1. *Indictment—Bribing witness.*—In an indictment, under Sec. 9, Art. V., Ch. 50, R. C. 1855, p. 601, it is not necessary to state that the testimony of the witness was material, nor that he had been summoned as a witness. Nor is it necessary to charge that the attempted bribery was with intent to impede and obstruct the due course of justice. Nor is it necessary to state the kind or amount of money or property offered to the witness. Nor is it necessary to state the intent of defendant. And when the attempt was made to induce

PRACTICE, CRIMINAL—*Continued.*

- a witness to absent himself, so as to prevent his giving testimony before a justice of the peace in a criminal proceeding, it will be sufficient to allege that the justice had jurisdiction of the matter heard before him.—*State v. Biebusch*, 276.
2. *Disturbance of Worship*.—To constitute the offence of disturbing religious worship, under the act, R. C. 1855, p. 630, § 30, it must appear that the acts charged as constituting the offence took place when the congregation were assembled for worship.—*State v. Edwards*, 548.
3. *Indictment—Larceny*.—The stealing of several articles of property at the same time and place constitutes but one offence, and should be so charged.—*State v. Daniels*, 558.
4. *Indictment—Larceny*.—The stealing of a horse, mare, or gelding, is made grand larceny by the statute, and it is therefore unnecessary to charge the value of the property in the indictment. (R. C. 1855, p. 575, § 25.)—*Id.*
5. *Indictments*.—An indictment which charges the defendant with an indecent exposure of his person on the public highway, but omits to charge that the act was open and notorious, although not good under sec. 8, art. 8, of the Act of Crimes and Punishments, (R. C. 1855, p. 624,) is yet good as an indictment for a misdemeanor at common law.—*State v. Rose*, 560.
6. *Indictment—Jeofails*.—A mistake in an indictment, which stated that the defendant, with a knife, did feloniously assault and wound one Dunlop, by means of which wounding the life of the said *Craighead* was then and there endangered, &c., is cured by the 27th sec. of art. 4 of Act of Practice in Criminal Cases, R. C. 1176, the mistake being merely clerical, and in no way tending to prejudice the substantial rights of the defendant.—*State v. Craighead*, 561.
7. *Indictment*.—An indictment under the statute for disturbing religious worship, R. C. 1855, p. 630, § 30, which charges the offence in the words of the statute, is sufficient.—*State v. Stubblefield*, 563.
8. *Indictment*.—When a statute contains provisos and exceptions in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the provisos of the act.—*State v. Cox*, 566.
9. *Indictment—Merchant without License*.—An indictment which charged that the defendant did "sell at a certain store, stand, and place, &c., various articles of goods, wares and merchandise, and drugs and medicines, &c., without having a license or legal authority to sell the same," charges the defendant as dealing as a merchant without a license, and its defects are cured by the provisions of the statute. (R. C. 1176, § 27.)—*Id.*
10. *Notice—Service*.—The authority to enforce a fine for a misdemeanor must be strictly construed. Therefore, where the ordinance required that the party should be served with notice, the notice must be served upon the person of the party to be charged.—*City of St. Louis v. Goebel*, 295.
11. *Juror—Crimes*.—A juror who has formed or declared an opinion upon the matter in issue is competent to serve, if the opinion was founded only on rumor and did not bias or prejudice his mind. (R. C. 1855, p. 1191, § 14.)—*State v. Rose*, 346.
12. *Instructions*.—It is the duty of the court to refuse instructions having no

PRACTICE, CRIMINAL—*Continued.*

application to the case as made by the issues and the evidence; and to give plainly expressed instructions to assist the jury in the application of the evidence given.—*State v. Rose*, 346.

13. *Penalty, reducing.*—The *minimum* penalty affixed by the statute to the larceny of a horse, mare, or gelding, is ten years' imprisonment in the penitentiary, and it was error in the Circuit Court to reduce the punishment assessed by the jury below the *minimum* thus affixed by the statute. (*R. C.* 1855, p. 1197, § 8.)—*State v. Daniels*, 558.

PRACTICE, CIVIL.

1. *Disability.*—Where the statute of limitations has run against a claim to land by tenants in common, if they join in the action, the disability of one tenant will not avail his co-tenant, but both will be barred. (*Keeton's heirs v. Keeton's Adm'r*, 20 Mo. 530-544, affirmed.)—*Walker v. Bacon*, 144.
2. *Pleading.*—An answer in ejectment which does not deny, admits the possession.—*Tomlinson v. Lynch*, 160.
3. *Pleading—Note.*—In a suit by the holder against the endorser of a promissory note, the petition must set out the facts which in law make the note negotiable, as that the note contains the words "value received, negotiable and payable without defalcation;" and it is not sufficient to allege that the note was negotiable, which would be a conclusion of law, and not a statement of fact.—*Jaccard v. Anderson*, 188.
4. *Pleading—Demand and Notice.*—In a suit to make the endorser of a negotiable promissory note liable, the petition must aver demand of payment from maker, refusal and notice to endorser, or the facts which will excuse or be equivalent to it, in order to show the defendant's liability.—*Id.*
5. *Arrest of Judgment.*—Where the petition does not state facts sufficient to constitute a cause of action, the judgment should be arrested.—*Id.*
6. *Pleading—Evidence.*—A defendant cannot make a defence by the evidence upon the trial unless it be presented by the pleadings.—*Currier v. Lowe*, 203.
7. *Pleading.*—The defence by a garnishee that the assets of a judgment debtor have been transferred by his conviction for crime, and being sentenced to the penitentiary, if a defence at all, cannot be brought forward by a motion to dismiss; it should be presented by plea.—*Wise v. Wolff*, 209.
8. *Counter-claim.*—The plea of partial failure of consideration of a promissory note does not constitute a counter-claim so as to require a replication.—*Carpenter v. Meyers*, 213.
9. *Pleading—Parties.*—Where the action concerns the separate property of the wife, she must sue or defend by her next friend, without joining the husband. (*R. C.* 1855, p. 1218, Practice, Art. II., § 7.)—*Claffin v. Van Wagoner*, 252.
10. *Pleading—Parties.*—Where it is sought to charge the wife's separate estate with her debts, her trustee is a proper party defendant, so that in case of sale the legal title may be conveyed. (*R. C.* 1855, p. 1218, § 4.)—*Id.*
11. *Parties.*—Suit is properly brought in the name of the person with whom the contract is made, although the business may have been conducted under an assumed partnership name.—*Wallhormfechtel v. Dobyns*, 310.
12. *Party—Injunction.*—The State cannot properly be made a party plaintiff, at

PRACTICE, CRIMINAL—*Continued.*

- the relation of a private citizen, to a bill of injunction to restrain the County Court of a county from issuing its bonds or levying a tax to pay for a subscription to the stock of a railroad company. The State has no interest, legal or equitable, in the subject matter.—*State, to use, v. Parkville and Grand River Railroad Co.*, 496.
13. *Pleading—condition precedent.*—In declaring on a contract containing stipulations to be performed by the plaintiff precedent to the performance of the agreement of the defendant, the plaintiff must allege the performance of such stipulations or a sufficient excuse for their non-performance.—*Essey v. Ambrose*, 484.
 14. *Pleading—Motion to strike out.*—A motion to strike out part of a pleading, described by reference to line and page, does not sufficiently specify the part referred to, and the Supreme Court will not review the action of the inferior court upon such motion.—*Patterson v. Hollister*, 478.
 15. *Trials.*—All suits upon bonds, bills or notes are, by sec. 26, Art. VI., Practice Act, R. C. 1855, p. 1235, triable at the return term.—*Carpenter v. Meyers*, 213.
 16. *Injunction.*—An injunction will not be granted, at the instance of a tax-payer, to restrain a County Court from levying a tax, upon the ground that the court had no jurisdiction, and that its action was a nullity. It must appear that the injury to the tax-payers would be irreparable, or such as could not be redressed by action at law. (*Sayre v. Tompkins*, 23 Mo. 443, affirmed.)—*State, to use, v. Parkville and Grand River Railroad Co.*, 496.
 17. *Trials—Nonsuit.*—Where the plaintiff needlessly takes a nonsuit, the Supreme Court will not relieve him.—*Gentry Co. v. Black*, 542.
 18. *Evidence.*—Where an instrument sued upon is set forth in the petition and admitted in the answer, it is not error in the court to refuse to allow the instrument to be read as evidence upon the trial.—*Id.*
 19. *Discontinuance.*—Leave to discontinue ought generally to be given a plaintiff, but the giving or refusing it is a matter of practice resting in the discretion of the court. It ought never to be given where it would deprive any defendant of a just defence.—*Adderton v. Collier*, 507.
 20. *Error—Continuance.*—To warrant the reversal of a judgment for alleged error in overruling a motion for continuance, the record must present a state of facts showing that the discretion of the court has been unsoundly exercised.—*Carpenter v. Meyers*, 213.
 21. *Depositions.*—Either party to a suit has the right to read in evidence the depositions taken by the opposite party, if offered at the proper time, without giving previous notice of his intention.—*McClintock v. Curd*, 411.
 22. *Issues.*—It is the duty of the court to state the issues to the jury, without referring them to the pleadings to ascertain what the issues are.—*Dassler v. Wisley*, 498.
 23. *Instructions.*—It is error to give instructions to the jury which there is no evidence to support.—*McClintock v. Curd*, 411.
 24. *Trials.*—An error of the court in refusing to a party the opening and conclusion of a case to the jury, furnishes no ground for a new trial, unless the party has been materially injured thereby.—*Farrell's Adm'r v. Brennan's Adm'r*, 328.

PRACTICE, CRIMINAL—*Continued.*

25. *Trials*.—In a suit under the statute to test the validity of a will admitted to probate, the party attacking the will holds the affirmative, and is entitled to open and conclude the case. But the Supreme Court will not reverse the judgment of the court below for refusing to the plaintiff such opening and conclusion, unless it appear that manifest injury has been done to the party thereby. (*Farrell's Adm'r v. Brennan's Adm'r*, ante, p. 328, approved.)—*McClintock v. Curd*, 411.
26. *Instruction*.—The Supreme Court will not decide upon the sufficiency of the evidence to warrant an instruction unless all the evidence be preserved in the bill of exceptions.—*White, Adm'r, v. Gray*, 447.
27. *Issues*.—The jury are properly instructed to disregard all evidence not pertinent to the issues presented by the pleadings.—*Id.*
28. *Appeal—Final Judgment*.—A judgment of the Circuit Court upon an appeal from the County or Probate Court, refusing to approve the report of sale of the real estate made by the administrator, is not a final judgment from which an appeal lies to the Supreme Court. (R. C. 1835, p. 53, § 20.)—*Wolff & Speck v. Wohlien*, 124.
29. *Judgment*.—Where several are sued at law, and the defence pleaded by one is available to the others, after a verdict and judgment for the defendant pleading, the plaintiff cannot have judgment by default against the other defendants, for the reason that upon the whole record it appears the plaintiff has no right of action.—*Adderton v. Collier*, 507.
30. *Judgment*.—The action of the court in sustaining a demurrer to a petition is not a final judgment, so that an appeal or writ of error may be prosecuted upon it.—*Robinson v. County Court of Morgan Co.*, 428.
31. *Final Judgment*.—The judgment dissolving an injunction and dismissing the bill of the plaintiff, is not a final judgment from which an appeal lies. *Pacific Railroad v. Burger*, 578.
32. *New Trial*.—An application for a new trial, on the ground of newly discovered evidence, must show that due diligence has been used.—*Barry v. Blumenthal*, 29.
33. *Exceptions*.—The bill of exceptions must show the reason for objections to the admission of evidence.—*Weston & Plattsburg Railroad Co. v. Cox*, 456; *Knipper v. Bechtner*, 255.
34. *Setting aside Judgments*.—Where there is any irregularity in the proceedings, a court may, on motion, at a subsequent term, set aside the judgment, or do whatever the justice of the case may require; but where the proceedings are regular, however erroneous, the power of the court to interfere ceases with the term.—*Harbor v. Pacific Railroad Company*, 423.
35. *Error—Jeofails*.—An error in the court in rendering judgment is not cured by the statute of jeofails after the term is passed; it can only be corrected by appeal or writ of error.—*Id.*
36. *Judgment*.—The action of the court in sustaining a demurrer to a petition is not a final judgment, so that an appeal or writ of error may be prosecuted upon it.—*Robinson v. Morgan County Court*, 428.
37. *Jeofails*.—A defective averment may be cured by verdict; but where an averment necessary to authorize a recovery is entirely omitted in the

PRACTICE, CRIMINAL—*Continued.*

- pleadings, the defect is not cured, and the judgment will be arrested.—*Frazer v. Roberts*, 457.
38. *Appeal, frivolous*.—Judgment affirmed with damages, no defence to the suit appearing.—*Owings v. McBride*, 221; *Clark v. Rogers*, 276.
39. *Transcript Filing*.—Judgment affirmed, appellant failing to file transcript.—*Laumier v. Steines*, 220; *Rogers, Adm'r. v. Bailey*, 229; *Garesché v. Mulloy*, 230; *Brooks v. Hannibal & St. Joseph Railroad*, 455.
40. *Assigning Errors*.—Judgment for failing to assign errors.—*Ivory v. Pearson*, 230; *Bernicker v. Claus*, 231; *State, to use of Buhr, v. Spaunhorst*, 232; *Clemens v. Clemens*, 456.

SUPREME COURT.

See PRACTICE, CIVIL AND CRIMINAL.

Q

QUO WARRANTO.

1. *Quo Warranto*.—The Supreme Court has jurisdiction of informations in the nature of a *quo warranto*; but the granting leave to file the information at the relation of a private person, depends upon the sound discretion of the court under the circumstances of the case. Where the attorney general files an information *ex officio*, it is not necessary for him to obtain leave of the court. The parties having an ample remedy in the Circuit Court, involving no difficulties, and the Supreme Court being chiefly an appellate tribunal, it refused to allow an information to be filed to inquire into the title of the relator to act as a director of the St. Charles branch of the Southern Bank. (*R. C.* 1855, p. 1308.)—*State v. McIlhany*, 379.

R

REVENUE.

1. *Tax Sale—Deeds*.—Where the statute required that the sale of lands for taxes should be made before the courthouse door of the county, and the sale was made inside the courthouse, the sale was void and no title passed by the sale and the register's deed thereupon. (*Revenue, R. C.* 1845, p. 949.)—*Rubey v. Huntsman*, 501.

S

SALES.

1. *Fraud*.—When a vendor sells property having a latent defect of which he is aware, but which he fails to disclose to the vendee, knowing that the latter is acting upon the supposition no such defect exists, he is guilty of a fraud, and the fraud may be pleaded as a defence to an action for the price of the property.—*Cecil, Adm'r, v. Spurger*, 462.

SECURITIES.

See BILLS AND NOTES, 2, 5.

1. *Surety*.—Although the contract into which the security had entered cannot be varied without his assent by any agreement between the creditor and principal debtor, yet, the creditor may properly take additional securities from the principals, not changing the terms of the collateral to the original contract. Where, therefore, the defendant had become security upon notes

SECURITIES—*Continued.*

given in consideration of lands sold to the principal, and the principal subsequently executed a deed of trust to secure payment of the same notes, which deed contained a proviso that in case of default for thirty days in the payment of any one of the notes, all the notes should become due and payable, and that the trustees might proceed to sell the lands and pay all of said notes, whether due on their face or not; *held*, 1. That by the terms of the deed the notes became due only so far as to authorize a payment from the proceeds of sale, and that no suit could be prosecuted upon them until they matured. 2. That the taking of such deed of trust operated to the benefit of the security, and did not change the effect of his contract.—*Morgan v. Martien*, 438.

SPECIFIC PERFORMANCE.

1. *Mistake—Specific Performance.*—When a contract for the sale of land had been executed by the vendor by his delivery of a deed to the purchaser, in which the grantee was misdescribed by the name of *John*, when his true name was *James*, the vendee was not entitled to bring his action to enforce a specific performance of the contract, but should have filed his petition in equity to correct the mistake in the deed in the description of the grantee.—*Colt v. Beaumont*, 118.
2. *Mistake.*—A court of equity will reform an instrument which, by reason of a mistake, fails to execute the intention of the parties, as well upon an equitable defence set up in an answer, as in a suit brought directly for that purpose. (*Leitensdorfer v. Delphy*, 15 Mo. 160, affirmed.)—*Hook, Adm'r, v. Craighead*, 405.
3. *Notice.*—The clerk of a Circuit Court in which a suit for specific performance of a contract for the sale of land is pending, thereby has notice of the nature of the claim of plaintiff.—*Dickerson v. Campbell*, 544.

STATUTES.

- Administration.*—R. C. 1835, p. 63—*Wolff v. Wohlien et al.*, 134. R. C. 1855, p. 1025, § 16—*Id.*
- Attachment.*—R. C. 1855, p. 238, § 1—*Ross v. Clark*, 296.
- Bills of Exchange—Notes.*—R. C. 1855, p. 296, § 16—*Farris v. Catlett*, 469.
- Boats and Vessels.*—R. C. 1855, p. 307—*Carr v. Burke*, 233.
- Bridges.*—R. C. 1845, p. 454—*Livingston Co. v. Graves*, 479.
- Corporations.*—Acts 1853, p. 64—*City of Independence v. Moore*, 392.
- Conveyances.*—Acts 1804, 1 T. L., p. 47, § 8—*Johnson v. Prewitt*, 553. R. C. 1855, § 1—*Slevin v. Brown*, 176.
- Crimes.*—R. C. 1855, p. 630—*Bernard v. Lipping*, 341: *Id.* p. 630, § 30—*State v. Edwards et al.*, 548: *Id.* p. 575, § 25—*State v. Daniels*, 558. R. C. 1855, p. 624, § 8—*State v. Rose*, 560. R. C. 1855, p. 630, § 30—*State v. Stubblefield*, 563; *State v. Edwards*, 548. R. C. 1855, p. 575, § 25—*State v. Daniels*, 538.
- Constables.*—R. C. 1855, p. 346, § 3—*Shreeley v. Wiggs*, 398.
- Ejectment.*—R. C. 1855, p. 695, § 33; Acts 1857, p. 34—*Slevin v. Brown*, 176.
- Execution.*—R. C. 1855, p. 964—*State, to use of Beazley, v. Blundin*, 387; *Id.* p. 751, § 67—*Mitchell v. Fulbright*, 551.
- Fees.*—Acts, 1860-1, pp. 30 & 31—*State, ex rel. McDermott, v. Auditor*, 222.

STATUTES—*Continued.*

- R. C. 1855, p. 756, § 2, and p. 275, § 13—*Freeman v. Henry Co.*, 446; *State, use, &c.*, v. *Parkville & Grand River Railroad*, 496.
- Guardians.*—R. C. 1855, p. 820—*Frost v. Winston*, 489.
- Limitations.*—R. C. 1855, § 1—*McCune v. O'Fallon*, 13; *Littleton v. Patterson*, 357: *Id.* p. 1046, § 5—*Johnson v. Prewitt*, 553.
- Mechanics' Liens.*—Acts 1856-7, p. 668, and R. C. 1855, p. 1064—*Hauser v. Hoffman*, 334; *Matlack v. Lare*, 262.
- Merchants.*—*State v. Cox*, 566.
- Inquests.*—R. C. 1855, p. 839—*Boisliniere v. Board St. Louis Co. Com.*, 375.
- Quo Warranto.*—R. C. 1855, p. 1308—*State, ex rel. Stewart, v. McIlhany*, 379.
- Practice, Civil.*—R. C. 1855, p. 1218, § 4—*Clafin v. Van Wagoner*, 252: p. 1232, § 12—*Tomlinson v. Lynch*, 160; *Carpenter v. Meyers*, 213: p. 1217, Art. II.—*Walker v. Bacon*, 144; *Clafin v. Van Wagoner*, 252; *Wallhormfechtel v. Dobyns*, 310. Art. VI., p. 1231, § 10—*Jaccard v. Anderson*, 188: p. 1236, § 31—*Patterson v. Hollister*, 478: p. 1235, § 26—*Carpenter v. Meyers*, 213: p. 1238, § 44—*Gentry Co. v. Black*, 542; *Adderton v. Collier*, 507. Art. X., p. 1259—*Carpenter v. Meyers*, 213; *White, Adm'r, v. Gray*, 447; *Dassler v. Wisley*, 498: p. 1268, § 47; § 27—*Weston & Plattsburg Railroad v. Cox*, 465; *Knipper v. Bechtner*, 255. Art. XII.—*Adderton v. Collier*, 507; *Robinson v. Morgan Co. Court*, 428; *Pacific Railroad v. Burger*, 578; *Barry v. Blumenthal*, 29; *Harbor v. Pacific Railroad*, 423; *Frazer v. Roberts*, 459. Art. XIV. (Supreme Court): R. C. 1855, p. 1298, § 21—*Laumeier v. Steines*, 220; *Rogers, Adm'r, v. Bailey*, 229; *Garesché v. Mulligan*, 230; *Brookes v. Hannibal & St. Jo. Railroad*, 455. R. C. 1855, p. 1298, § 23—*Ivory v. Pearson*, 230; *Bernicker v. Claus*, 231; *State, to use, &c.*, v. *Spaunhorst*, 232; *Clemens v. Clemens*, 456.
- Practice, Criminal.*—R. C. 1855, Art. IV.—*State v. Edwards*, 548; *State v. Daniels*, 558: § 27—*State v. Craighead*, 561; *State v. Cox*, 566. Art. VI., § 14—*State v. Rose*, 346: p. 1197, § 8—*State v. Daniels*, 558. R. C. 1845, (Revenue), p. 949—*Rubey v. Huntsman*, 501.
- Swamp Lands.*—Acts 1850-1, p. 239—*Andrew Co. v. Craig*, 528.
- Wills.*—R. C. 1855, p. 1565—*McClintock v. Curd*, 411; *Farrell's Adm'r v. Brennan's Adm'r*, 328.
- Witnesses.*—R. C. 1855, p. 1257—*Tomlinson v. Lynch*, 160; *Kleinman v. Boernstein*, 311; *Parish v. Frampton*, 396.

SWAMP LANDS.

See LANDS AND LAND TITLES, 19.

U

USES AND TRUSTS.

1. *Powers—Marriage Settlement.*—In view of marriage, property was conveyed by settlement and contract by the intended wife, to trustees, to hold until marriage to the use of the grantor and her heirs, and from the marriage to the sole and separate use, benefit and disposal of the wife for and during her natural life, free of her husband's control, &c., and to such uses as the said wife might by writing, &c., direct and appoint; and on her death to such uses as she by will might appoint and direct; and if she died

USES AND TRUSTS—*Continued.*

intestate, to the use of the issue of the marriage then living; and in default of such issue, to the use of the heirs of said wife. The deed further provided that all the property might from time to time be successively charged, invested and reinvested indefinitely by the trustees on the request in writing, &c., of the wife. *Held*, that the wife, with the trustees, could, by proper conveyances, pass the fee of the lands settled by the deed, and that she was not confined to the disposal of a life estate only.—*Pendleton v. Bell*, 100.

2. *Trust*.—R. P. and his children being jointly interested in land with G. P. and his children, the land was sold in partition and purchased by R. P. for the joint benefit of himself and G. P., no money being paid except the costs, of which each paid one half. R. P. gave G. P. a written acknowledgment, as follows: "I do hereby declare that the purchases which I made, &c., were made for the joint account of G. P. and myself on a verbal agreement between him and me—the deeds of sale are to be made by the commissioner to me. If G. P. wishes to have one half of each tract, I shall execute deeds to him to that purpose; otherwise and until then, whenever I shall sell any part of either, I shall account to him for the one half of the nett proceeds." *Held*, that the trust was a trust for the purpose of converting the land into money, and might as well be executed by the executor of R. P. after the death of G. P. and R. P. as by R. P. himself, no request for a conveyance prior to the sale being shown.—*Paul v. Fulton and Brother-ton*, 110.

8. *Powers*.—By a marriage contract dated July 6, 1842, between W. R., the father of A. R., and A. R. with T. A., it was agreed that all property that said W. R. might give or convey to said A. R. or T. A., or to their use, and the rents, issues and profits thereof, should be held and enjoyed in accordance with the terms of the conveyance or instrument of writing settling such property, except as in such contract afterward specially provided. It was further provided by the second article of said contract, that at any time during the marriage the parties to the contract might sell any of the property that might be conveyed by the said W. R. to the said T. A. or A. R., in accordance with the preceding stipulation, except where different provisions should be made by the deed of conveyance, in which case the provisions of the deed should control. The contract provided further, by article 4, that W. R. should purchase and settle upon his daughter A. R., to provide an annual income, productive real estate in the city of St. Louis, to be selected by him, in trust that the income should be paid to the said A. R., or her written order, during her natural life; and in case she should die leaving a child or children surviving her, then the payment to be made to such children until the youngest should attain the age of twenty-one years, at which time the fee should vest in such surviving child or children, &c. But if said A. R. should die without issue, then the absolute estate in said estate should revert to the said W. R. and his heirs. W. R. owning, at the time, a large amount of unproductive real estate, after the marriage, by deed of June 9, 1843, conveyed seven tracts of land in fulfilment of the purposes mentioned in the marriage contract to the said A. R., to hold to her sole use for life, and after her death to such of the children of said Ann as should attain

USES AND TRUSTS—*Continued.*

twenty-one years of age, &c. But if the said A. R. died without issue, or issue attaining said age, then the title to revert to said W. R. or his heirs—the limitations prescribed by the deed following generally the stipulations of the contract for the purchase and settlement of income-producing property. Subsequently, W. R. purchased productive real estate, in compliance with the contract, and in satisfaction of the agreement to settle real estate producing income, and settled the same upon his daughter, and she, with her husband, acknowledged that the stipulations of the contract in that respect had been fully complied with. The plaintiffs, as agents for T. A., contracted for the sale of one of the pieces of land conveyed by W. R. to his daughter by their deed of June 9, 1843; and the said T. A. and wife, and the said W. R., joined in a conveyance to the purchaser, who refused to comply with his purchase, alleging that the deed tendered did not pass a good title in fee simple. Upon a suit by the plaintiffs against T. A., to recover the commissions due them for effecting a sale which fell through on account of a defect in the title, *held*, that by virtue of the marriage contract, and the deed of June 9, 1843, that the deed of W. R. and T. and A. A. to the purchaser, was a good and effective deed to pass the fee, and that the sale had not failed from any fault of the defendant.—*Kent & Obear v. Allen*, 87.

4. *Trustee—Wife's Estate.*—Where the legal title in a leasehold estate in lands was vested in a trustee for the benefit of the wife, the death of the wife will not prevent the trustee from recovering the possession of the property in ejectment. The legal title remains in the trustee.—*Slevin v. Brown*, 176.
2. *Uses, Statute of.*—The statute of uses does not apply to chattels real. (*R. C. 1855, p. 354, § 1.*)—*Slevin v. Brown*, 176.

W

WILLS.

1. *Practice.*—In a suit under the statute to test the validity of a will admitted to probate, the party attacking the will holds the affirmative, and is entitled to open and conclude the case. But the Supreme Court will not reverse the judgment of the court below for refusing to the plaintiff such opening and conclusion, unless it appear that manifest injury has been done to the party thereby.—*McClintock v. Curd*, 411. S. P. (*Farrell's Adm'r v. Brennan's Adm'r*, ante, p. 328.)
2. *Sanity of Testator.*—Upon an inquiry as to the sanity of the testator, the proper question to submit to the jury is, "Were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time when he executed the will?"—*Id.*
3. *Sanity of Testator.*—Witnesses acquainted with testator may state their opinions as to his sanity, but should not be asked "if they thought his mind sound enough to make a will," as that would involve a question of law for the court to determine, and not the witness.—*Farrell's Adm'r v. Brennan's Adm'r*, 328.
4. *Fraud.*—Voluntary deeds in the nature of a will made with the intent to deprive a wife of her dower, would be, as to her, fraudulent and void. (*S. C. 29 Mo. 350.*)—*Tucker v. Tucker*, 464.

WITNESSES.

1. *Competency*.—The wife of one of the defendants is not a competent witness for the other defendants who have joined in the defence.—Tomlinson v. Lynch, 160.
2. *Competency*.—A maker of a promissory note against whom judgment by default has been taken, is a competent witness for an endorser made co-defendant in the same suit.—Kleinmann v. Boernstein, 311.
3. *Competency—Assignor*.—An assignor of a chose in action is not a competent witness for the assignee to prove facts about the claim which occurred anterior to the assignment. (R. C. 1855, p. 1577, § 3.)—Parish v. Framp-ton, 396.

ERRATUM.

Page 505, in second line of head note, for "had organized" read "had *not* organized."

